
RESPONDING TO THE COVID-19 PANDEMIC: CONSTITUTIONAL IMPLICATIONS



*A Guide to Relevant Constitutional Legal Principles Implicated When
Responding to a Public Health Crisis*

Prepared by the University of Maine School of Law

TABLE OF CONTENTS

AUTHORS & SUPERVISING FACULTY	iii
EXECUTIVE SUMMARY	iv
RIGHT TO VOTE	iv
RIGHT TO TRAVEL	iv
BUSINESS OPERATIONS	v
MASK MANDATES	v
RELIGIOUS GATHERINGS	v
INTRODUCTION	1
USING THIS GUIDE	3
LEGAL DISCLAIMER	3
U.S. GOVERNMENT STRUCTURE & THE POWER TO ACT DURING A PANDEMIC ...	4
FEDERAL GOVERNMENT	5
SEPARATION OF POWERS	5
DELEGATION AND EMERGENCY POWERS	6
EXECUTIVE ORDERS	8
TENTH AMENDMENT COMMANDEERING	9
STATE GOVERNMENTS	10
POLICE POWERS	10
SEPARATION OF POWERS	11
EXECUTIVE POWER	12
EXECUTIVE ORDERS	12
STATE OF EMERGENCY & EMERGENCY POWERS	13
HOME RULE AND THE MUNICIPAL GOVERNMENT	15
FUNDAMENTAL RIGHTS AND DUE PROCESS CHALLENGES	16
SELECTED ISSUES AND ANALYSIS	18
HOW CAN MAINE ALTER ITS VOTING RULES DURING A PANDEMIC?	18
RIGHT TO VOTE	18
ALTERING AN ELECTION	19
ALTERING VOTER REGISTRATION RULES	21

ALTERING THE NUMBER AND LOCATION OF POLLING PLACES	22
ALTERING ABSENTEE BALLOT / VOTE-BY-MAIL RULES	23
CAN MAINE PLACE RESTRICTIONS ON TRAVEL INTO THE STATE?	26
RIGHT TO TRAVEL	26
STATE QUARANTINE POWER	27
MAINE COVID-19 TRAVEL RESTRICTIONS AND QUARANTINE ORDERS	28
CAN MAINE RESTRICT THE OPERATION OF BUSINESSES WITHIN THE STATE?	30
INTRODUCTION	30
CONSTITUTIONAL CHALLENGES	31
<i>A. SUBSTANTIVE DUE PROCESS</i>	31
<i>B. PROCEDURAL DUE PROCESS</i>	32
<i>C. DORMANT COMMERCE CLAUSE</i>	34
<i>D. FIFTH AMENDMENT TAKINGS</i>	35
MOVING FORWARD	37
CAN MAINE MANDATE THE USE OF FACE COVERINGS?	38
INTRODUCTION	38
CONSTITUTIONAL CHALLENGES	39
<i>A. SUBSTANTIVE DUE PROCESS</i>	39
<i>B. FIRST AMENDMENT EXPRESSIVE CONDUCT</i>	41
MOVING FORWARD	41
WHAT CAN MAINE DO WITH RESPECT TO RELIGIOUS GATHERINGS?	41
FREEDOM OF RELIGION	41
CONSTITUTIONAL CHALLENGES	43
<i>A. THE FEDERAL CONSTITUTION TEST—SMITH</i>	43
<i>B. THE MAINE CONSTITUTION TEST—BLOUNT</i>	48
MOVING FORWARD	49
CONCLUSION	51

AUTHORS

ADAM MOONEY is a second-year student at the University of Maine School of Law in Portland, Maine. Adam previously graduated from the University of Southern Maine with a Bachelor of Arts in Criminology.

Email: adam.mooney@maine.edu

RICHARD QAULEY is a second-year student at the University of Maine School of Law in Portland, Maine. Richard received his Bachelor of Science in Chemical Engineering from the University of Maine.

Email: richard.qualey@maine.edu

SUPERVISING FACULTY¹

PROFESSOR DMITRY BAM is a Professor of Law, Vice Dean, and Provost at the University of Maine School of Law. He teaches courses in constitutional law, professional responsibility, and employment law, and his scholarship focuses on judicial ethics and judicial selection. Prior to joining Maine Law, he practiced law at Morrison & Foerster and Jones Day, and served as a Fellow at the Stanford Center on the Legal Profession at Stanford Law School.

Email: dmitry.bam@maine.edu

PROFESSOR JEFF THALER is a Professor of Practice at the University of Maine School of Law, who creates and teaches courses in Administrative Law and Statutory Interpretation, Energy Law, and Trial Practice, among other courses. He also is Associate University Counsel for the University of Maine, and a long-time Maine attorney in the private and public sectors. He has published in 2020 a series of articles on COVID-19 legal issues.

Email: jeffrey.thaler@maine.edu

¹ Please direct any questions or comments directly to Professors Dmitry Bam and Jeff Thaler at the email addresses provided above. Thank you.

EXECUTIVE SUMMARY

Throughout this Guide, readers will find an in-depth look at how restrictions implemented to “flatten the curve” of the COVID-19 pandemic relate to constitutional issues. Specifically, we will discuss procedural and substantive due process issues such as infringements on the right to vote and the right to travel, as well as all those rights implicated by restrictions on business operations such as the Dormant Commerce Clause and Fifth Amendment Takings, and finally we will discuss the Free Exercise Clause and how it has been implicated by restrictions on gathering sizes. The analysis provided is intended to be an objective discussion of when these restrictions implicate the United States Constitution. A short synopsis is provided below:

RIGHT TO VOTE: Although it took a great many years, a number of hard-won battles, and several amendments to the Constitution before the United States government recognized every person’s right to vote, it is a right that has long been considered fundamental. The COVID-19 pandemic spread throughout the United States at the start of an election year and stay-at-home orders, quarantine requirements, limitations on gathering sizes, and the general avoidance of public spaces have created unexpected challenges for voter registration and in person voting. Maine, as a state which already allows no-excuse absentee ballots, and where the legislature acted early in the pandemic to delegate the power to reschedule the primary election, is well positioned to ensure that no person is disenfranchised, and all people are able to cast their ballot on or before election day.

RIGHT TO TRAVEL: Though it appears nowhere in the Constitution or the Bill of Rights, the right to travel has long been considered a fundamental right for all United States citizens. As such, that right can only be infringed to serve a compelling state interest. Protecting the public from the threat of disease certainly meets that demanding standard, but the restrictions must be deliberate and equitable. Quarantines and isolations of those infected by a disease or at risk of spreading the disease are methods used throughout the past to protect the public health and have been codified as acceptable methods for both the federal and state governments to use in order to control the spread of disease.

BUSINESS OPERATIONS: When it comes to restrictions that affect businesses, like only allowing essential businesses to conduct face-to-face operations or limiting the amount of people that can be inside a store at a time, restrictions must be carefully drawn to avoid being struck down as unconstitutional. The key to restricting businesses is not discriminating against interstate commerce, avoiding infringing on any rights that could be deemed fundamental (which doesn't include the right to do business without government restriction), and allowing businesses to operate in at least some capacity to avoid committing a regulatory taking.

MASK MANDATES: Mandating the wearing of masks in public places is within the scope of the police powers held by the states, and it seems unlikely that a mask mandate would violate the United States Constitution. Courts have been hesitant to extend the definition of a fundamental right to include being in a public space without wearing a mask during the COVID-19 pandemic, and it is very unlikely that a court would find forced wearing of a mask to be expressive conduct protected by the First Amendment. Following that, mask mandates are likely constitutional.

RELIGIOUS GATHERINGS: Even though freedom of religion is expressly protected by the First Amendment, it can still be restricted in times of emergency, specifically a public health emergency. Restrictions must be well-crafted to avoid singling out or targeting religion and must, generally speaking, treat religious activity the same as secular activity. Failing to treat religious activity the same as secular activity will trigger a heightened scrutiny, and at that point the restriction must be narrowly tailored to avoid arbitrarily restricting the free exercise of religion.

INTRODUCTION

In December 2019 the world learned of a new strand of coronavirus (SARS-CoV-2) that originated in Wuhan, China and was rapidly spreading throughout the country. As China went on lockdown, imposing travel restrictions and stay-at-home orders on its residents, the world watched in anticipation and fear that the virus might spread outside of the country. In early January, these fears were confirmed. The virus and the infection it causes, eventually labeled COVID-19, had escaped China and cases were confirmed throughout Asia and Europe, but the United States—often spared from the larger repercussions of global diseases because of its relative isolation in the western hemisphere—held out hope that perhaps it would escape the virus.

On January 21, 2020, those hopes were dashed when the Centers for Disease Control and Prevention (CDC) confirmed the first U.S. case of COVID-19 in the state of Washington.² In the following weeks, more cases of COVID-19 were confirmed in more cities across the U.S., many with direct links to China, so on February 2, the U.S. imposed travel restrictions on people traveling into the country from China.³ By mid-February only fifteen cases of COVID-19 were confirmed in the U.S., and although the travel restrictions imposed on China were partially effective, by this time the virus had spread throughout other regions of the world, and infected travelers were coming into the U.S., unrestricted, from many of these other regions.⁴ These infected travelers, undetected by the CDC, returned to their local communities, and the virus quietly infected others and eventually spread throughout the country as people continued to travel domestically.

By late February, health experts concluded that the virus was likely to spread widely within the U.S. With much still unknown about the virus at the time, such as how the virus was transmitted from person to person, how widely it had already spread, and what symptoms it caused, health experts and government officials urged the public to embrace social distancing measures, the only guaranteed way to slow the spread of the virus.

Each state responded differently, with some issuing statewide stay-at-home orders, others issuing mandatory face covering requirements in public spaces, and some taking lenient or no measures. Since then, COVID-19 has caused worldwide disruption, including but not limited to

² *First Travel-related Case of 2019 Novel Coronavirus Detected in United States*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

³ Derek Watkins et al., *How the Virus Won*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-spread.html>.

⁴ *Id.*

global economic upheaval, long-term periods of government-mandated business closures, and disruptions to our election system as governors try to prevent the spread of the disease at the ballot box. The word “unprecedented” is often used to describe the present situation. However, while we may be living in unprecedented times, we are not without legal precedent. Many of the current legal issues, though challenging, are not new.⁵ They have been discussed and litigated during other crises in our nation’s history, most notably in the early twentieth century. That era saw outbreaks of deadly diseases such as the Spanish flu, smallpox, and typhoid, and the government—as it is now—was forced to respond to those outbreaks.

The entire world has felt the effects of COVID-19, and the State of Maine has not been immune. As of September 18, 2020, the United States is reporting a total of 6,613,331 cases and 196,277 deaths since the beginning of the pandemic.⁶ In the same time period, Maine is reporting a total of 5,005 cases, and 138 total deaths.⁷ Due to its economic reliance on tourism, Maine has also experienced the secondary economic effects of the pandemic, in part due to travel restrictions imposed on people traveling into the state. And as this Guide goes to print, the end of the COVID-19 pandemic is far from view. Closer to view, as we head into cooler weather, is the concern that the number of cases and deaths will again rise to new and unimaginable heights, prompting the need for renewed governmental intervention into the daily lives of its citizens.

Thus, this Guide is intended to inform Maine citizens, including elected officials, attorneys, and business owners about some of the constitutional issues implicated by various governmental responses to the COVID-19 pandemic. Beginning with some of the specific constitutional rights at issue (*e.g.*, freedom of religion, right to travel, voting rights), this Guide provides an overview of relevant legal precedent, and presents options that lawmakers and decision makers may have when attempting to respond to COVID-19. Though this Guide is largely specific to Maine, where the United States Constitution and federal laws are implicated the analysis that follows is more broadly applicable and may provide a starting point for other states to look more closely at their own laws that are implicated in their response to COVID-19.

⁵ See Jeff Thaler, *The Next Surge is Coming: What Can Governors Constitutionally Do to Prevent More COVID-19 Deaths and Cases This Fall?* 1-7 (August 17, 2020) (forthcoming publication).

⁶ *Cases and Deaths in the U.S.*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Sept. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/us-cases-deaths.html>.

⁷ *COVID-19: Maine Data*, ME. CTR. FOR DISEASE CONTROL AND PREVENTION (Sept. 18, 2020), <https://www.maine.gov/dhhs/mecdc/infectious-disease/epi/airborne/coronavirus/data.shtml>.

USING THIS GUIDE

This Guide was developed with the goal of helping Maine citizens, including elected officials, attorneys, and business owners, to better understand the legal implications of various COVID-19 response measures. The Guide begins with a brief overview of our federalism structure of government to establish the role of the federal and state governments in responding to the COVID-19 pandemic. Following this overview is a brief breakdown of how due process challenges—central to most attacks on COVID-19 restrictions—are analyzed in court. Several issue-specific sections then follow. Within each section, this Guide provides an analysis of the legal doctrines invoked by the actions taken, along with relevant case law either from Maine’s own precedent or, where Maine precedent is absent, other state and federal precedent. Finally, under each section, this Guide provides a brief look at likely legal outcomes and larger overall legal implications. Each issue specific section can be read as its own stand-alone piece for quick reference, but this Guide also follows logically in order if read in concert with the other sections.

LEGAL DISCLAIMER

The legal information and analysis in this Guide are not legal advice upon which any readers of this Guide should rely. Readers should consult with an attorney for individualized legal advice and should neither take nor refrain from taking action based on the information provided in this Guide. This Guide is also not a comprehensive list of all of the constitutional issues that could possibly arise in the COVID-19 context, it instead provides a detailed analysis of selected topic areas.

U.S. GOVERNMENT STRUCTURE AND THE POWER TO ACT DURING A PANDEMIC

Federalism is defined as “[t]he legal relationship and distribution of power between the national and regional governments within a federal system of government.”⁸ The United States Constitution created a system of government in which power is distributed both vertically and laterally. Vertically, power is distributed between the federal government and the independent governments of each of the fifty states. Within both of these vertically separated levels of the government, there is then a lateral separation of power between the judicial, legislative, and executive branches. Regarding the vertical separation of power, the Tenth Amendment states that the “powers not delegated to the United States by the Constitution, or prohibited by it to the [s]tates, are reserved to the [s]tates respectively, or to the people.”⁹ The basic principle: the federal government has all powers explicitly enumerated to it by the Constitution along with any other powers that are necessary and proper for executing those enumerated powers,¹⁰ and the state governments hold all other powers.

Where there exists a conflict between the laws of the federal and state governments, generally, the federal law will preempt the state law. States cannot interfere with federal exercise of constitutionally granted power because the Constitution, as explicitly stated in its own text, is the “supreme law of the land.”¹¹ This remains as true now, in a time of national emergency, as it has always been throughout the history of the United States. It is not uncommon for federal statutes to include specific preemption provisions, specifying whether or not the statute will preempt relevant state or local laws. Absent this express preemption section any state law that conflicts with federal law can be challenged as violating the Supremacy Clause. An exception to this preemption doctrine is that a federal law that is unconstitutional will not preempt a conflicting state law, because it is not a valid law itself.

⁸ *Federalism*, BLACK’S LAW DICTIONARY (5th pocket ed. 2016).

⁹ U.S. CONST. amend. X.

¹⁰ *See generally* *McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹¹ U.S. CONST. art. VI.

FEDERAL GOVERNMENT

SEPARATION OF POWERS

The United States Constitution separated the powers of the federal government between three separate branches—judicial, legislative, and executive.¹² The federal judicial branch holds the power to hear cases and controversies,¹³ and the power of judicial review, and the ability to “say what the law is.”¹⁴ The federal legislative branch holds a variety of powers, including but not limited to the power to regulate interstate commerce, tax and spend, declare war, and establish post offices.¹⁵ And the federal executive branch holds those powers necessary to execute and enforce the laws.¹⁶ Because the executive branch plays a critical role in the country’s response to public health crises, this section begins with an overview of the general powers held by the federal executive branch and then turns to a discussion of how those powers can be used in response to the COVID-19 pandemic.

The Constitution vests the executive power in a President of the United States.¹⁷ Among those powers expressly granted to the President by the Constitution are the powers of the Commander-In-Chief of the United States military, the power to grant pardons for offenses against the United States, the power to make treaties and nominate and appoint executive officers (with the advice and consent of the Senate), the power to appoint officers during recess vacancies, and the power to faithfully execute the laws of the United States.¹⁸ Generally, the power of the executive branch has been described as strongest when acting with Congressional approval, weakest when acting to the contrary of Congress (needing an express constitutional grant to act), and in a “twilight zone” when acting where Congress has not expressly granted or denied the action.¹⁹ Though the constitutionally-granted powers held by the federal executive branch may not be particularly well suited to respond to the COVID-19 pandemic, the legislative branch has delegated powers to the executive branch that have proven much more effective in handling such crises.

¹² See U.S. CONST. art. I-III.

¹³ U.S. CONST. art. III, § 2.

¹⁴ See *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

¹⁵ U.S. CONST. art. II, § 8.

¹⁶ See U.S. CONST. art. II.

¹⁷ U.S. CONST. art. II, § 1.

¹⁸ U.S. CONST. art. II, § 2-3.

¹⁹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

DELEGATION AND EMERGENCY POWERS

Some of the powers delegated to the executive branch are available at all times, whereas others are only available in limited circumstances. The President's declaration of a national emergency on the basis of the COVID-19 pandemic on March 13, 2020²⁰ made a broader scope of powers available to the federal executive branch, including approximately 160 powers delegated to it by the legislative branch that may be used during a national emergency.²¹ The National Emergencies Act gives the President the power to declare a national emergency, and sets the guidelines for when and how they may do so.²² While this declaration does not, itself, expand the powers of the President, it activates other statutes that temporarily expand the scope of authority of the executive branch.

Some of the powers transferred to the President following a declaration of national emergency are the power to require the armed forces to undertake construction projects that relate to the national emergency at hand,²³ the power to seize control of radio and television stations, phone systems, and the internet to direct communications that they deem essential,²⁴ and the power to regulate or prohibit transactions of foreign exchange and the importing of currency or securities.²⁵ The President's power in declaring a national emergency was increased in 1983, when the Supreme Court invalidated the legislative veto, because that made it more difficult for Congress to terminate a national emergency declaration.²⁶ Following the invalidation of the legislative veto, a national emergency will come to an end either when there is a joint resolution from Congress terminating the national emergency or when the President issues a proclamation terminating the national emergency.²⁷

Congress has delegated other powers to the federal executive branch that are more pertinent to the pandemic. The legislative branch created the Public Health Service in 1944,²⁸ which

²⁰ Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020).

²¹ Gregory Korte, *Justice Department: President can't use emergency powers in secret*, USA TODAY (Dec 9, 2016, 12:16 PM), <https://www.usatoday.com/story/news/politics/2016/12/09/justice-department-president-cant-use-emergency-powers-secret/95153056/>.

²² 50 U.S.C.S. § 1621 (LexisNexis 2020). A recent non-pandemic example of this power being used would be President Trump invoking it to begin construction on a border wall along the Mexico-United States border in February of 2019. Proclamation 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

²³ 10 U.S.C.S. § 2808 (LexisNexis 2020).

²⁴ 47 U.S.C.S. § 606 (LexisNexis 2020).

²⁵ 50 U.S.C.S. § 1702 (LexisNexis 2020).

²⁶ *See INS v. Chadha*, 462 U.S. 919, 955 (1983).

²⁷ 50 U.S.C.S. § 1622 (LexisNexis 2020).

²⁸ 42 U.S.C.S. § 203 (LexisNexis 2020).

delegated authority to the federal executive branch to deal with many different public health issues, including pandemics and public health emergencies. The President may utilize the Public Health Service to “promote the public interest” in a time of emergency—a very broad grant of power.²⁹ Congress has also given the Surgeon General (another member of the executive branch) very broad authority in battling the spread of communicable diseases, as the Surgeon General is “authorized to make and enforce such regulations . . . to prevent the . . . spread of communicable diseases.”³⁰ The Defense Production Act also gives the President the power to require manufacturers to prioritize contracts to produce materials needed to combat a national emergency³¹—a power that President Trump has already invoked to combat the COVID-19 pandemic (further discussed below). Congress also created the Federal Emergency Management Agency (FEMA hereafter) and delegated to the President the power to coordinate disaster relief and provide emergency assistance to states.³² Also of note, Congress has delegated to the President the power to suspend the issuing of visas to any class of aliens deemed to be “detrimental to the interests of the United States,”³³ though, this power does not require a national emergency declaration to become available to the President.

All of the previously discussed delegations of legislative power must be able to pass the nondelegation doctrine. However, nondelegation doctrine jurisprudence indicates that this is not a difficult task. The current test for constitutionality under the nondelegation doctrine is known as the “intelligible principle” doctrine. Under this doctrine, “[s]o long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform, such legislative action is not a forbidden delegation.’”³⁴ While many commentators believe the nondelegation doctrine to be essentially “dead,” recently Supreme Court Justice Gorsuch has opined for its return, expressing a desire to prevent the executive branch from having pure law-making ability.³⁵ It is possible that in the future the Supreme Court will change course on nondelegation, but at this point it is unlikely that any of the legislative delegations of power to

²⁹ 42 U.S.C.S. § 217 (LexisNexis 2020).

³⁰ 42 U.S.C.S. § 264(a) (LexisNexis 2020).

³¹ 50 U.S.C.S. § 4511 (LexisNexis 2020).

³² 42 U.S.C.S. § 5134, 5192 (LexisNexis 2020).

³³ 8 U.S.C.S. § 1182(f) (LexisNexis 2020).

³⁴ *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

³⁵ *Gundy v. United States*, 139 S. Ct. 2116, 2135-36 (2019) (Gorsuch, J., dissenting).

the executive branch for times of national emergency, such as the current COVID-19 pandemic, will be found to violate the nondelegation doctrine.

EXECUTIVE ORDERS

One of the most common ways the federal executive branch exercises power (including those powers delegated to it by the legislative branch) is through the issuing of executive orders. An executive order is defined as “an order issued by or on behalf of the President” and it “instruct[s] the actions of executive agencies.”³⁶ Since declaring that we are in a state of national emergency on March 13,³⁷ President Trump has signed several executive orders to use federal executive branch power to respond to the COVID-19 pandemic. In an Executive Order signed on March 18, 2020, President Trump determined that medical resources such as personal protective equipment and ventilators met the criteria in the Defense Production Act,³⁸ and therefore used his powers under the Defense Production Act to have companies begin prioritizing the production of personal protective equipment and ventilators.³⁹ Another relevant Executive Order—signed on March 27, 2020⁴⁰—emphasized the authority of the Secretary of Defense to order any unit into the Ready Reserve and recall retired officers or enlisted members of the Coast Guard into active duty.⁴¹

Even more recently, an Executive Order signed on June 4, 2020 advised federal agencies to use all of their lawful emergency powers to respond to the nation’s economic recovery efforts.⁴² This Executive Order also included reference to the fact that President Trump determined the COVID-19 pandemic was an emergency of nationwide scope under 42 U.S.C. § 5191(b), which allowed FEMA to more easily dispense emergency funds to any state that needed it.⁴³ President Trump also issued a Proclamation advising the Secretary of State to deny the visa requests of people from China,⁴⁴ Iran,⁴⁵ most of Europe,⁴⁶ and the United Kingdom and Ireland⁴⁷ who pose a

³⁶ *Executive Order*, BLACK’S LAW DICTIONARY (5th pocket ed. 2016).

³⁷ Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020).

³⁸ 50 U.S.C.S. § 4501 (LexisNexis 2020).

³⁹ Exec. Order No. 13909, 85 Fed. Reg. 16227 (Mar. 23, 2020).

⁴⁰ Exec. Order No. 13912, 85 Fed. Reg. 18407 (Apr. 1, 2020).

⁴¹ 10 U.S.C.S. § 12303 (LexisNexis 2020), 14 U.S.C.S. § 2127, 2308 (LexisNexis 2020).

⁴² Exec. Order No. 13927, 85 Fed. Reg. 35165 (June 9, 2020).

⁴³ Exec. Order No. 13927, 85 Fed. Reg. 35165 (June 9, 2020).

⁴⁴ Proclamation 9984, 85 Fed. Reg. 6709 (Feb. 5, 2020).

⁴⁵ Proclamation 9992, 85 Fed. Reg. 12855 (Mar. 4, 2020).

⁴⁶ Proclamation 9993, 85 Fed. Reg. 15045 (Mar. 16, 2020).

⁴⁷ Proclamation 9996, 85 Fed. Reg. 15341 (Mar. 18, 2020).

risk of spreading COVID-19 to people in the United States. Those Proclamations were made pursuant to the power to suspend the entry of any class of aliens deemed detrimental to the United States, as delegated by the legislative branch and discussed above.⁴⁸ Lastly, while there has been no nationwide restriction on non-essential travel, the Center for Disease Control (CDC hereafter) did implement an order that only allowed cruise ships to embark or disembark passengers with approval from the United States Coast Guard in an effort to prevent transmission of COVID-19 by passengers or workers from cruise ships.⁴⁹ This “No Sail Order” was made with the power delegated to the executive branch to create regulations to prevent the spread of communicable diseases.⁵⁰

TENTH AMENDMENT COMMANDEERING

The federal executive branch, even when power is delegated to it by the legislative branch, is limited by the Tenth Amendment. The Tenth Amendment states that “powers not delegated to the [federal government] by the Constitution . . . are reserved to the [s]tates.”⁵¹ This prevents the federal government from commandeering state governments, specifically the state executive branch⁵² and the legislative branch.⁵³ This prevents the President from forcing state governors to lift stay-at-home orders, or forcing state governors to declare all houses of worship essential, as President Trump recently alluded to in a press briefing.⁵⁴ On the other hand, if the federal legislative branch were to pass a law opening all businesses that participate in interstate commerce—or pass a law delegating that authority to President Trump and he signed an executive order opening all businesses that participate in interstate commerce—it would likely be lawful as that would be an example of the federal government regulating interstate commerce, which is a constitutionally granted power held by the federal government. Thus, while the federal

⁴⁸ 8 U.S.C.S. § 1182(f).

⁴⁹ No Sail Order and Suspension of Further Embarkation, 85 Fed. Reg. 16628, 16631 (Mar. 24, 2020).

⁵⁰ 42 U.S.C.S. § 264.

⁵¹ See U.S. CONST. amend X.

⁵² *New York v. United States*, 505 U.S. 144, 177 (1992).

⁵³ *Printz v. United States*, 521 U.S. 898, 908-11 (1997).

⁵⁴ Quint Forgey, Rachel Roubein, & Myah Ward, *Trump declares houses of worship ‘essential,’ pressuring governors to let them reopen*, POLITICO (May 22, 2020, 4:02 PM), <https://www.politico.com/news/2020/05/22/trump-churches-essential-coronavirus-274763>. It is worth noting that President Trump has not signed any executive orders regarding the matter or otherwise attempted to force governors to declare houses of worship essential since making these statements, but the possibility of a second wave and the repeated closure of houses of worship makes this worth mentioning.

government, either through legislative acts or legislative delegations and then Presidential acts, cannot force state governments to govern in certain ways while responding to the COVID-19 pandemic, the federal government is not prevented from acting pursuant to their constitutionally granted powers in responding to the COVID-19 pandemic.

To conclude, while the federal executive branch does have some constitutionally-granted powers that would be useful in responding to the COVID-19 pandemic, the powers at its disposal that are most useful come from legislative delegations of power, and we have already seen some of those powers being used. However, while the federal executive branch does have the powers discussed above to respond to the COVID-19 pandemic, the state governments—armed with the police powers—are much better equipped to respond directly to the COVID-19 pandemic.

STATE GOVERNMENTS

POLICE POWERS

Within the powers reserved to the states by the United States Constitution are the general police powers, which allow the states to establish and enforce laws in a manner not inconsistent with the protection of the health, safety, and general welfare of the people.⁵⁵ These police powers are broad in scope and are not explicitly defined by what the states *are* permitted to do; rather they are defined in case law by what the states are *not* permitted to do for the protection of its people. The reason for this definition by omission is twofold. First, as referenced by the Tenth Amendment, the States hold all powers which are not expressly enumerated to the federal government by the United States Constitution. Second, the protection of the health, safety, and general welfare of the people is among the most paramount responsibilities of any government, and in federalism, that power is best entrusted to the level of government closest to the people.

The deference granted to a state that is facing a public health emergency and uses its general police powers to enact measures to protect its residents is perhaps best defined in the century old case of *Jacobson v. Massachusetts*. In *Jacobson*, a city experiencing an outbreak of smallpox enacted a regulation requiring that all inhabitants be vaccinated.⁵⁶ When this regulation was challenged, the Court denied the Plaintiff's request for injunctive relief saying:

⁵⁵ See *Police Powers*, BLACK'S LAW DICTIONARY (5th pocket ed. 2016).

⁵⁶ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Professor Jeffrey Thaler of the University of Maine School of Law discusses the applicability and implications of the *Jacobson* decision on the current COVID-19 pandemic in

Upon the principle of self-defense, a paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members . . . [E]very well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.⁵⁷

As the United States again faces the threat of a deadly viral infection, new cases are quickly arising, challenging state regulations enacted in response to the COVID-19 pandemic. As recently as May 29, 2020, the Supreme Court of the United States denied a request for injunctive relief from a California stay-at-home order as to in-person religious services. In a concurring opinion, Chief Justice John Roberts wrote:

Our Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect.” *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those officials “undertake[] to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.” *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an “unelected federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).⁵⁸

Though the government’s power to take action to protect the health, safety, and general welfare of its citizens is broad in scope, and its outer reaches remain uncertain, it is not without limitation. Some of these limitations are drawn between the interactions of the Federal and State governments, but others come from within each respective government.

SEPARATION OF POWERS

The State of Maine Constitution—in many ways reflective of the United States Constitution—distributes governmental power between three distinct departments: the legislative, the judicial, and the executive.⁵⁹ These three departments are to be kept separate, such that no

more detail in his recent publication. *See* Jeff Thaler, *The Next Surge is Coming: What Can Governors Constitutionally Do to Prevent More COVID-19 Deaths and Cases This Fall?* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3604706 (August 17, 2020) (forthcoming).

⁵⁷ *Jacobson*, 197 U.S. at 27, 29.

⁵⁸ *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring).

⁵⁹ ME. CONST. art. III, § 1.

person belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except where permitted by the Constitution.⁶⁰

The legislative branch is separated into two distinct departments, a House of Representatives, and a Senate, and is chiefly responsible for the creation of laws.⁶¹ The judicial branch, with power vested in the Supreme Judicial Court, and other courts as established by the Legislature, is responsible for interpreting the laws.⁶² The executive branch, in which supreme executive power of the State is vested in a Governor, is responsible for enforcing the laws of the State of Maine.⁶³ It is this executive branch where considerable power is vested in the protection of the health, safety, and welfare of the people of Maine—particularly in times of greatest need. And it is this executive power which has been called upon, and has come under much scrutiny, in the State’s response to the COVID-19 pandemic.

EXECUTIVE POWER

The Governor of the State of Maine has all powers defined under Article V of the Constitution, along with any powers expressly delegated to the Governor by state statutes. Some of the powers expressly reserved to the Governor by the Maine Constitution include the power of Commander in Chief of the army and navy,⁶⁴ the power to appoint officers⁶⁵ to aid them in faithfully executing the laws,⁶⁶ and, most broadly, the supreme executive power of the state.⁶⁷ This supreme executive power grants the Governor the discretion necessary to faithfully execute and enforce the laws of the state. The governor can exercise these powers through a variety of mechanisms including executive orders, executive budgets, and legislative proposals and vetoes.⁶⁸

EXECUTIVE ORDERS

An executive order is an order issued by the Governor that is intended to direct or instruct the actions of executive agencies or government officials, or to set policies for the executive branch

⁶⁰ ME. CONST. art. III, § 2.

⁶¹ ME. CONST. art. IV, § 1.

⁶² ME. CONST. art. VI, § 1.

⁶³ ME. CONST. art. V, § 1.

⁶⁴ ME. CONST. art. V, § 7.

⁶⁵ ME. CONST. art. V, § 8.

⁶⁶ ME. CONST. art. V, § 12.

⁶⁷ ME. CONST. art. V, § 1.

⁶⁸ *Governors’ Powers & Authority*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/consulting-2/powers-and-authority/> (last visited Aug. 26, 2020).

to follow.⁶⁹ Although an executive order is not a law per se (only the legislature has the power to create laws), it does operate with the force of law. Both laws created by the legislature and executive orders issued by the Governor are enforceable by the executive branch and can be challenged in court, but an executive order cannot be overturned by the legislature.⁷⁰ Because the Governor cannot create law, executive orders are issued pursuant to constitutional or statutory authority.⁷¹ For example, Governor Mills’s March 18th Order to Protect Public Health—her first executive order filed in response to the COVID-19 pandemic—in which she limited gathering sizes to no more than ten people, and ordered the closing of all bars and restaurants, was issued pursuant to 37-B M.R.S. Ch. 13.⁷² The emergency powers delegated to the Governor are defined by statute, and are discussed in more detail in the following section.

STATE OF EMERGENCY & EMERGENCY POWERS

Under Maine law, the Governor has the power to declare a State of Emergency⁷³ by oral proclamation “whenever a disaster or civil emergency exists or appears imminent.”⁷⁴ A disaster is any “occurrence or imminent threat of widespread or severe damage, injury or loss of life or property resulting from any natural or man-made cause, including, but not limited to . . . epidemic, [or] extreme public health emergency.”⁷⁵ Once a State of Emergency has been declared, “the Governor may assume direct operational control over all or any part of the emergency management and public safety functions within the State.”⁷⁶ The authority granted to the Governor under a State of Emergency declaration is broad and includes but is not limited to the authority to “prepare a comprehensive plan and program for the emergency management function of [the] State;” the authority to “procure supplies and equipment, institute training programs and public information

⁶⁹ *Executive Order*, BLACK’S LAW DICTIONARY (5th pocket ed. 2016).

⁷⁰ *What Is an Executive Order?*, AM. BAR ASS’N, (Nov. 27, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order/.

⁷¹ *Governors’ Powers & Authority*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/consulting-2/powers-and-authority/> (last visited Aug. 26, 2020).

⁷² Me. Exec. Order No. 14 FY 19/20 (March 18, 2020)

⁷³ Maine’s Governor, Janet Mills, first proclaimed a State of Emergency on March 15, 2020, and as of September 11, 2020, has renewed the State of Emergency several times, most recently on September 2, 2020. Me. Proclamation “Proclamation of State of Civil Emergency to Further Protect Public Health” (Mar. 15, 2020); Me. Proclamation “A Proclamation to Renew the State of Civil Emergency” (Sept. 2, 2020).

⁷⁴ 37-B M.R.S. § 742(1) (Westlaw through 2019 2d. Reg. Sess. of 129th Me. Leg. Sess.).

⁷⁵ *Id.* § 703(2) (Westlaw).

⁷⁶ *Id.* § 741(1) (Westlaw).

programs and take all other preparatory steps . . . to ensure the furnishing of adequately trained and equipped forces of emergency management personnel;” the authority to “establish emergency reserves of those products necessary to ensure the health, welfare and safety of the people of the State;” and the ability to “[d]elegate any authority vested in the Governor under this chapter and provide for the subdelegation of that authority.”⁷⁷ In short, the Governor has the far reaching authority necessary to combat an emergency in order to protect the health, safety, and welfare of the people of the State of Maine.

Of particular relevance, in order to combat the current threat presented by the COVID-19 pandemic, the Legislature has adopted language under 37-B M.R.S. § 742(1)(C)(13) that grants the Governor further authority to “adjust time frames and deadlines imposed by law . . . , suspend the termination of residential electricity and water services . . . , and [m]odify or suspend the requirements for professional or occupational licensing or registration by any agency.”⁷⁸ Further, effective until January 15, 2021, the Legislature has granted the Governor the authority to “implement for elementary and secondary schools a plan to . . . [w]aive [] compulsory attendance requirements . . . and . . . [c]ontinue to provide nutrition services to students when schools are closed in response to the threat posed by COVID-19.”⁷⁹

A State of Emergency declaration can be terminated in one of three ways. First, the declaration will expire after thirty days unless it is renewed by the Governor.⁸⁰ Second, whenever the Governor is satisfied that the state of emergency no longer exists, they shall issue another proclamation declaring that the state of emergency is over.⁸¹ And third, the Legislature may terminate a state of emergency at any time by a joint resolution.⁸²

Finally, just as there is a separation of powers between the Federal and State governments in a Federalism form of government, there is also a separation of powers between the State and local governments, or municipalities. This separation of powers is perhaps less thoroughly defined than the separation between the Federal and State government, and it differs by state, but it too may affect the ability of a governor to act to protect the health and safety of the people of the state.

⁷⁷ *Id.* § 741(3) (Westlaw).

⁷⁸ *Id.* § 742(1)(C)(13) (Westlaw).

⁷⁹ *Id.* § 742(1)(D)(1) (Westlaw).

⁸⁰ *Id.* § 743 (Westlaw).

⁸¹ *Id.*

⁸² *Id.*

HOME RULE AND THE MUNICIPAL GOVERNMENT

“Home Rule” refers to the level of autonomy granted to municipalities either through state legislative provisions, or through provisions included in the state’s constitution.⁸³ These provisions can be presented in a variety of ways, but they fall primarily into two categories. In the first category—where Maine resides⁸⁴—a Home Rule provision may be included in the state’s constitution which grants municipalities broad discretion to pass laws and govern themselves, so long as they do not violate the state or federal constitutions. Whereas, in the second category, in order to pass a law or ordinance, municipalities must seek approval from the state legislature. The legislature may pass statutes which allow municipalities a certain amount of autonomy to govern themselves, but the municipality must still seek legislative approval if they wish to pass a law or ordinance which falls outside of the latitude granted by the statutory provisions.

In either of these categories, one broad question remains: does state law preempt local government law when there is a direct conflict? Because every state constitution is different, and the Home Rule provisions may vary (or be entirely absent), the answer to this question will be correspondingly different for each state. The State of Maine Constitution provides that “[t]he inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character.”⁸⁵ Though the language of this provision makes clear that where prohibited by the Constitution or general law municipalities will not have the power to act, it does not make clear what happens when the municipality is not expressly prohibited from acting, but its actions may be in conflict with a statewide policy or order, such as a stay-at-home order, a mandatory quarantine, or a mask wearing mandate.

In an effort to protect the health, safety, and general welfare of its citizens, Maine has issued a series of statewide Executive Orders including stay-at-home orders, bar and restaurant closures, restriction on non-essential travel, etc. The question now becomes, what happens when a Maine municipality, also with the intention of protecting its people, issues local ordinances to

⁸³ *Home Rule*, BLACK’S LAW DICTIONARY (5th pocket ed. 2016).

⁸⁴ 30-A M.R.S. § 3001 states that “[a]ny municipality . . . may exercise any power or function which the Legislature has power to confer upon it, which is not denied . . . and exercise any power or function granted to the municipality by the Constitution of Maine, general law, or charter.” This statute also includes a provision requiring the statute itself to be liberally construed and a provision creating a “rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality’s home rule authority.” 30-A M.R.S. §3001(1)-(2) (Westlaw through 2019 2d. Reg. Sess. of 129th Me. Leg. Sess.).

⁸⁵ ME. CONST. art. VIII, pt. 2, § 1.

address the pandemic that are in conflict with statewide policies? It is easy to envision a municipality that wants to reduce the restrictions mandated by the state, but what about a municipality that desires to impose more strict ordinances than the state? These questions are ones which have largely not been litigated in the past but may arise amidst the COVID-19 pandemic.

In fact, early in the pandemic, on March 15th, the island town of North Haven, Maine issued an order prohibiting nonresidents from coming to the island.⁸⁶ The town rescinded this order two days later, and instead issued a resolution urging visitors to postpone coming to the island, citing a lack of health care resources on the island and concern about the widespread harm an outbreak could cause.⁸⁷ The Town Administrator said the town rescinded the order after an attorney in Governor Mills's administration informed the town that "only the governor has the authority to restrict travel in the state, and that her power supersedes any authority that town officials have."⁸⁸ Because the order was rescinded voluntarily, the question as to the authority of a local government to impose stricter mandates than the state remains unanswered.⁸⁹

FUNDAMENTAL RIGHTS AND DUE PROCESS CHALLENGES

For the purposes of this Guide, we will be looking at what the State of Maine can do, constitutionally, in response to the COVID-19 pandemic. A key issue in most of the litigation surrounding COVID-19 related restrictions is due process, one of the key constitutional protections afforded to United States citizens. The right of due process can be found in both the Fifth Amendment⁹⁰ and the Fourteenth Amendment,⁹¹ and it applies to both federal and state

⁸⁶ Stephen Betts, *North Haven Rescinds Order to Prevent Nonresidents from Coming to the Island*, PORTLAND PRESS HERALD (Mar. 19, 2020), <https://www.pressherald.com/2020/03/19/north-haven-rescinds-island-travel-ban/>

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See also Courtney Courtright, *Orono Councilors Vote in Favor of Requiring Face Coverings in Indoor Public Spaces*, WABI5 (Aug. 29, 2020) <https://www.wabi.tv/2020/08/26/orono-councilors-vote-in-favor-of-requiring-face-coverings-in-indoor-public-spaces/> ("Orono town councilors voted 6 to 1 on Wednesday night in favor of an emergency ordinance which requires face coverings in all indoor public spaces."); Dennis Hoey & Eric Russel, *Sanford Council Adopts Mask Ordinance as Virus Spreads in City*, PORTLAND PRESS HERALD (Sept. 11, 2020), <https://www.pressherald.com/2020/09/10/sanford-council-to-debate-vote-on-mask-ordinance-amid-covid-19-outbreaks/> (The city of Sanford, Maine passed an ordinance that "strengthens Gov. Janet Mills' July 8 executive order by requiring all businesses in the city to post signs letting customers know they must wear a cloth covering over their mouth and nose to gain entrance. It also carries an enforcement provision that could result in fines and possible closure for businesses that fail to comply.").

⁹⁰ U.S. CONST. amend. V.

⁹¹ U.S. CONST. amend. XIV.

governments. Due process is broken down into two areas, both of which have been implicated in challenges to COVID-19 restrictions: substantive due process and procedural due process. For purposes of this Guide, it is useful to set out the substantive due process test and case law here, as it is implicated in nearly all of the issues discussed below.⁹²

Substantive due process is one of the key constitutional protections for the fundamental rights of Americans. Fundamental rights are a group of rights that the Supreme Court has recognized as requiring a high degree of protection from government encroachment.⁹³ These rights are either expressly defined by the United States Constitution (primarily in the Bill of Rights) or, where a specific enumeration in the Constitution is absent, are rights that are “implicit in the concept of ordered liberty”⁹⁴ or “deeply rooted in this Nation’s history and tradition.”⁹⁵

Some fundamental rights, though highly protected, can be infringed under the right circumstances. In order to constitutionally infringe a citizen’s fundamental rights, the government bears the burden of showing that the infringement of that right was necessary to achieve a compelling government interest.⁹⁶ The high standard of “necessity” demands that the government action be narrowly tailored to achieve the compelling government interest, and not be over broad or over inclusive. Said another way, this means that the government action must be the only, or certainly the best, way to achieve the compelling interest with the resources and information available. Under this substantive due process framework, if a right is not found to be fundamental then the challenger instead bears the burden of showing that the restriction does not pass the rational basis test. The rational basis test requires the challenged law to be rationally related to a legitimate government interest,⁹⁷ which is the lowest level of scrutiny applied under this context, and it is very rare for a law not to pass the rational basis test.

During a public health emergency, however, some courts have used a different approach to decide a substantive due process claim. Stemming from *Jacobson*, this test only results in a statute being overturned if it does not have a “real or substantial relation to the protection of the

⁹² Procedural due process will be discussed briefly in the Business section later on, as it only really applies to decisions made in that context.

⁹³ Legal Information Institute, *Fundamental Right*, CORNELL L. SCH., https://www.law.cornell.edu/wex/fundamental_right (last visited Aug. 27, 2020).

⁹⁴ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁹⁵ *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion).

⁹⁶ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

⁹⁷ *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

public health” or is a “plain, palpable invasion of rights secured by the fundamental law.”⁹⁸ This test shows much more deference to the government action than the traditional substantive due process test, but it is only used during times of public health emergency, similar to the *Jacobson* case itself, set during a smallpox epidemic. The rest of this Guide will look at issues involving substantive due process along with other constitutional issues arising under those contexts.

SELECTED ISSUES AND ANALYSIS

HOW CAN MAINE ALTER ITS VOTING RULES DURING A PANDEMIC?

RIGHT TO VOTE

A democracy is a system of government in which “every citizen of the country can vote to elect its government officials.”⁹⁹ Where a person’s right to vote is obstructed, that person is prevented from participating in our democracy. Accordingly, the Supreme Court has held that the right to vote is a fundamental right.¹⁰⁰ This means that the government cannot infringe a citizen’s right to vote unless strict scrutiny is met.¹⁰¹ With regard to voting rights, this means that if a person’s right to vote is infringed by a government action, the government must show that there was no way to prevent infringing upon the citizen’s right to vote, while still protecting the public health and safety.

At a time when absentee voting (or voting-by-mail) is accepted in some form in every state, and when three states conduct their elections entirely by mail, with proper planning there need not be any infringement of a citizen’s right to vote. However, with the COVID-19 pandemic arising in the middle of the country’s presidential primary election, some states have had to act quickly, and have not been granted the luxury of time to plan properly and act deliberately.

The discussion that follows is an issue specific analysis of how the state of Maine, and the country, can prepare for the coming election cycle and ensure that all citizens are able to vote, without having to choose between exercising that fundamental right, and staying healthy and safe from COVID-19.

⁹⁸ *Jacobson*, 197 U.S. at 31.

⁹⁹ *Democracy*, BLACK’S LAW DICTIONARY (5th pocket ed. 2016) (emphasis added)

¹⁰⁰ See *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.”).

¹⁰¹ *Supra* pp. 16–18.

ALTERING AN ELECTION

At least forty-five states have statutes in place that address election day emergencies in some form. Although the statutes vary greatly as to the definition of an emergency, and the exact actions that are permitted in response, all state statutes fall within three main categories in terms of the broad response they authorize: (1) Delay or Reschedule the Election, (2) Relocate Polling Places, and (3) Both Delay and Relocate.¹⁰² Six states each fall under categories (1) and (3), and the remainder—including Maine—fall under category (2). Maine has three relevant election emergency statutes:¹⁰³

- 21-A M.R.S. § 604 – (Emergency Ballot Procedure) The secretary of state may provide new ballots when a county does not have enough for voters.
- 21-A M.R.S. § 631-A(3) – Municipal officers can change the location of a polling place in an emergency.
- 21-A M.R.S. § 663 – The secretary of state may work to facilitate voting in areas where the governor has declared a state of emergency.

Of these three, 21-A M.R.S. § 663 is the most informative. In further detail, the statute declares that the administrative actions the Secretary of State may take include, but are not limited to, “central issuance and receipt of absentee ballots for federal and state elections using the systems and procedures developed for uniformed service voters and overseas voters.”¹⁰⁴ This statute—at the discretion of the Secretary of State—positions Maine well for hosting an entirely vote-by-mail election in November.

Absent from the Maine election emergency statutes is any explicit mention of the ability to postpone an election. Section 663 may, under the Secretary of State’s permitted administrative actions, include the ability to postpone the election since the statutes take care not to limit the Secretary’s power to those enumerated, but the question is left open to interpretation. Certainly, nowhere in these election emergency powers is the Governor expressly granted the power to postpone or otherwise alter an election. And looking to the emergency legislation passed prior to

¹⁰² *Election Emergencies*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 7, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx>. This source provides a listing of the relevant election emergency laws in place in each of the fifty states.

¹⁰³ *Id.*

¹⁰⁴ 21-A M.R.S. § 663 (Westlaw through 2019 2d. Reg. Sess. of 129th Me. Leg. Sess.).

the convening of the Legislature,¹⁰⁵ it would appear that it is within the role of the Legislature to designate such power.

The power to take reasonable administrative actions necessary to facilitate the originally scheduled June 9, 2020 elections was expressly granted to the Governor in emergency legislation passed just before the legislature was convened due to the threat posed by the COVID-19 pandemic.¹⁰⁶ Part L of SP0789, LD 2167, reads:

“[T]he Governor [is authorized], only for the elections scheduled to be held on June 9, 2020, to take any reasonable administrative actions the Governor considered necessary to facilitate voting by all residents registered to vote in this State in a manner that preserves and protects public health in response to COVID-19, including, but not limited to, issuance and receipt of absentee ballots for the June 9, 2020 elections.”¹⁰⁷

This provision was passed by both houses of the legislature on March 17, 2020, and signed into law by the Governor on March 18, 2020¹⁰⁸—the same day that Governor Mills issued Executive Order 14, “An Order to Protect Public Health,” her first executive order issued in response to the COVID-19 pandemic.¹⁰⁹

This provision makes quite clear that Governor Mills acted well within her powers when she issued Executive Order 39 FY 19/20, “An Order Modifying the Primary Election to Reduce Exposure to COVID-19,” postponing the June 9, 2020 election to July 14, 2020,¹¹⁰ but it leaves open the question of who has the power to postpone, or take other administrative actions for the November 3, 2020 presidential election. Further, if the power to designate the authority to postpone and take other reasonable administrative actions to facilitate elections does indeed rest with the legislature, who then has the power to designate such authority when the legislature is not in session? Is that power included in those reserved to the governor under the administrative actions granted to her under a state of emergency proclamation?

¹⁰⁵ Part L of SP0789, LD 2167, *An Act to Implement Provisions Necessary to the Health, Welfare and Safety of the Citizens of Maine in Response to the COVID-19 Public Health Emergency*.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Me. Exec. Order No. 14 FY 19/20 (March 17, 2020).

¹¹⁰ Me. Exec. Order No. 39 FY 19/20 (April 10, 2020).

ALTERING VOTER REGISTRATION RULES

The first step in the voting process is voter registration. As of June 30, 2019, a total of twenty-one states plus the District of Columbia have enacted same day registration.¹¹¹ That means that citizens in more than half of the states still require voter registration in advance of election day. In a typical election year, voter registration drives are commonplace, and it is not outside of the ordinary to see a third-party group registering voters at public events. But in a time of social distancing, and state restrictions on public gathering sizes, these voter registration opportunities are minimal, if not totally absent. Additionally, registration locations such as state Departments of Motor Vehicles are closed.¹¹² Although online voter registration does provide an additional opportunity that is compliant with social distancing requirements, access to the internet is often subject to socioeconomic factors and online voter registration can prove to be difficult for those with disabilities or language barriers.¹¹³ Although access to the internet is normally made accessible to the public through libraries and town offices, those too are closed to the public due to social distancing requirements. Therefore, access to voter registration is unquestionably hindered compared with previous election years, and may prevent millions from registering and voting.¹¹⁴ In acknowledgement of some of these challenges—and in an effort to maintain or increase citizens’ access to the polls while minimizing exposure to public spaces, and the threat of COVID-19—many states have passed legislation or issued executive orders postponing elections, expanding access to absentee ballots and allowing online registration, or even mandating that absentee ballots be sent to all registered voters.¹¹⁵

Maine allows same day registration, and no-excuse absentee voting, or voting-by-mail, and a ballot can be requested online, in-person, or in writing up to and including the day of the election. See the “Absentee Ballots / Voting-By-Mail” below for more details.¹¹⁶

¹¹¹ *Same Day Voter Registration*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 12, 2020), <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

¹¹² Jason A. Abel, *Voting in an Era of Crisis*, AM. BAR ASS’N (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/voting-in-an-era-of-crisis/.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *COVID-19 and Elections*, NAT’L CONF. OF STATE LEGISLATURES (July 2, 2020), <https://www.ncsl.org/research/elections-and-campaigns/state-action-on-covid-19-and-elections.aspx>.

¹¹⁶ *Infra* p. 23.

ALTERING THE NUMBER AND LOCATION OF POLLING PLACES

Though the general election is not until November, presidential primary elections, state primary elections, and state runoff elections were all in full swing when the COVID-19 outbreak spread across the United States. In response to the spread of the virus, states issued differing forms of stay-at-home orders, all of which encouraged social distancing and limited, or prevented public gatherings, and closed public spaces. Polling places are public spaces. Because COVID-19 spreads from person to person through water droplets produced when an infected person coughs, sneezes, or talks,¹¹⁷ public spaces—where people are brought into close proximity with one another—expose people to greater risk of transmission of the virus. Therefore, voting in the traditional manner—by showing up at the polling place on Election Day—will inevitably increase the likelihood for transmission of the virus. Precautions can be taken, and this risk can be reduced, but it cannot be eliminated entirely.

To further complicate matters, of the age data reported for approximately 53% of poll workers who served in 2016, 46% were sixty-one or older.¹¹⁸ In Maine, that number was nearly 67%.¹¹⁹ This means that a significant portion of poll workers are at an elevated risk of severe illness linked to COVID-19, because the risk for severe illness increases with age.¹²⁰ Because of the enhanced risk associated with showing up at the polling place, many states are experiencing challenges in finding poll workers to staff the polls, and polling locations willing to host the polling stations.¹²¹ Notably, in Milwaukee, the number of polling places for Wisconsin's April 7 primary election were reduced from 180 down to only five, in no small part because of a shortage of poll workers willing to show up.¹²²

Some of the sharpest reductions in the number of polling places have been in cities that are home to large populations of voters of color. The nonprofit Voter Protection Corps issued a

¹¹⁷ *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL AND PREVENTION (July 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

¹¹⁸ *EAVS Deep Dive: Poll Workers and Polling Places*, U.S. ELECTION ASSISTANCE COMM. (Nov. 15, 2017), <https://www.eac.gov/documents/2017/11/15/eavs-deep-dive-poll-workers-and-polling-places>.

¹¹⁹ Carrie Levine, *Elderly Workers Run Elections, but COVID-19 Will Keep Many Home*, CTR. FOR PUB. INTEGRITY (May 13, 2020), <https://publicintegrity.org/politics/elections/democracy-2020/elderly-workers-run-elections-but-covid-19-will-keep-many-home/>.

¹²⁰ *Older Adults and COVID-19*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

¹²¹ *Id.*

¹²² *Id.*

report¹²³ finding that Black Americans, Native Americans, voters in need of language assistance, and people with disabilities all vote in-person at above average rates.¹²⁴ This means that maintaining some viable in-person voting options will be essential to ensuring that all voters are able to cast their ballot in November.

ALTERING ABSENTEE BALLOT / VOTE-BY-MAIL RULES

A potential solution to avoid the necessity of gathering in a public space to cast a ballot in-person is voting-by-mail. Voting-by-mail, or absentee voting, was first used in the United States during the Civil War in order to allow both Union and Confederate soldiers to cast their ballots from the battlefield, and have them be counted back home.¹²⁵ Then, in the late 1800s states began passing laws that allowed citizens who were away from home or ill on Election Day to cast absentee ballots,¹²⁶ but these laws were limited, and varied by state. In 1942 and 1944, Congress passed federal laws that allowed soldiers serving in World War II to cast absentee ballots from overseas.¹²⁷ Then, in the 1980s California became the first state to allow citizens to request an absentee ballot freely, and without excuse.¹²⁸ In the decades that followed a number of other states passed similar laws, and by 2018, twenty-seven states had adopted no-excuse absentee ballot laws, and three states even conduct their elections entirely by mail.¹²⁹

Although all states now allow absentee voting in some form—including the twenty-seven states that allow no excuse absentee voting, and the three states that conduct their elections entirely by mail—each state still has their own voting laws that vary in many ways including when the absentee ballot can be requested, whether the absentee ballot has to be requested in-person or can be requested by mail or online, whether voter identification is required, or whether a witness

¹²³ Mike Firestone, Jack Descheler, & Louie Goldsmith, *Keep The Polls Open* (June 2020), <https://static1.squarespace.com/static/5d4510352755f600012998f7/t/5eeb9e73ee8615767d422e4a/1592499829207/VPC+Report+6.18+FINAL+-+FOR+WEBSITE.pdf>.

¹²⁴ Carrie Levine & Pratheek Rebala, *'I Wanted My Vote to be Counted': In South Carolina, a Peek at COVID-19's Impact on Elections*, CTR. FOR PUB. INTEGRITY (June 22, 2020), <https://publicintegrity.org/politics/elections/in-south-carolina-a-peek-at-covid-19s-impact-on-elections-polling-place/>.

¹²⁵ *Voting by mail and absentee voting*, MIT ELECTION DATA & SCI. LAB, <https://electionlab.mit.edu/research/voting-mail-and-absentee-voting> (last visited Aug. 27, 2020).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Although the all mail election states (Washington, Oregon, and Colorado) now *distribute* all their ballots by mail, it is important to note that many voters still *return* their ballots in-person to a designated drop off location—73% in Colorado, 59% in Oregon, and 65% in Washington. *Id.*

signature is required for the absentee ballot to be counted (among other differences). Currently, eighteen states impose some level of restrictions or barriers on voters seeking to cast an absentee ballot.¹³⁰

Another challenge with absentee ballots, highlighted by the April 7 primary election in Wisconsin, is the deadline.¹³¹ Some state deadlines require that the ballot be *postmarked* by election day, whereas others require that the ballot be *received* by election day. Where election officials have time to properly distribute and process absentee ballots, this does not present any new challenges beyond those of a normal election year, but where election officials are experiencing significant increases in absentee ballot requests and submissions due to the COVID-19 pandemic, this can, indeed, present a difficult new challenge. Election officials are normally able to anticipate levels of voter turnout, including absentee ballot requests, by looking at data from past years and tracking rates of voter registration as the election day approaches. Now, however, election officials are having to respond to large increases in absentee ballot requests on short notice, and their systems may not be equipped to handle such an influx.¹³²

Wisconsin's primary election was scheduled for April 7, not long after the COVID-19 pandemic began spreading rapidly throughout the United States. As many states were taking action to postpone their elections, Wisconsin's Democratic governor decided to follow suit, however, Republicans challenged his authority to do so.¹³³ The federal district court judge ruled that the election would continue as scheduled but ordered the deadline for receipt of absentee ballots to be extended to April 13—six days past election day—pointing out that clerks were facing severe backlogs and delays as they struggled to meet surging demand for absentee ballots.¹³⁴ Upon appeal to the Supreme Court of the United States, on April 6—the day before the election—the Court held that the deadline for receipt of absentee ballots could not be extended.¹³⁵ By this time, much

¹³⁰ Elise Viebeck et al., *Shuttered polling places and a dearth of cleaning supplies: Voters confront pandemic-fueled confusion at the polls*, WASH. POST (Mar. 17, 2020), https://www.washingtonpost.com/politics/shuttered-polling-places-and-a-dearth-of-cleaning-supplies-voters-confront-pandemic-fueled-confusion-at-the-polls/2020/03/17/55dba1f6-685f-11ea-b313-df458622c2cc_story.html.

¹³¹ Jim Rutenberg & Nick Corasaniti, *How a Supreme Court Decision Curtailed the Right to Vote in Wisconsin*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/13/us/wisconsin-election-voting-rights.html>.

¹³² *Id.*

¹³³ Jason A. Abel, *Voting in an Era of Crisis*, AM. BAR ASS'N (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/voting-in-an-era-of-crisis/.

¹³⁴ *Id.*

¹³⁵ *Id.*

damage had already been done. Some tens of thousands of absentee ballots had already been distributed with explicit instructions informing voters that the ballots would be accepted up to April 13—as the federal district court judge had originally ruled.¹³⁶ As a result, many voters were disenfranchised.

Perhaps partially as a result of the unfortunate situation that played out in Wisconsin, on April 10 Maine’s Governor issued an executive order, acting pursuant to emergency powers granted to her under Maine’s state of emergency legislation, as well as explicit emergency powers granted to her by the legislature in response to the COVID-19 pandemic, rescheduled Maine’s originally scheduled June 9 election to July 14, extending all registration and absentee ballot request deadlines accordingly.¹³⁷ In the following months, as states continue to prepare for the November election, the Supreme Court heard, and continues to hear, a number of other voting related cases.¹³⁸

In Maine, an absentee ballot can be requested by any voter without the necessity of providing an excuse.¹³⁹ An absentee ballot can be requested beginning three months before the election, with the ballots becoming available not less than thirty days prior to the election—barring an emergency.¹⁴⁰ An absentee ballot may be requested in writing, by telephone, or by other electronic means as authorized by the Secretary of State.¹⁴¹ Additionally, a person may cast an absentee ballot in-person, in the presence of a clerk, ahead of election day, and need not complete an application ahead of time to do so.¹⁴² Finally, “in order to be valid, an absentee ballot must be delivered to the municipal clerk at any time before the polls are closed”¹⁴³ on election day. In an effort to increase awareness of the availability of absentee voting to encourage people to avoid

¹³⁶ Jim Rutenberg & Nick Corasaniti, *How a Supreme Court Decision Curtailed the Right to Vote in Wisconsin*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/13/us/wisconsin-election-voting-rights.html>.

¹³⁷ Me. Exec. Order No. 39 FY 19/20 (April 10, 2020).

¹³⁸ See generally *Republican Nat’l Comm. v. Common Cause R.I.*, No. 20A28, 2020 U.S. LEXIS 3632 (Aug. 13, 2020); *Clarno v. People Not Politicians Or.*, No. 20A21, 2020 U.S. LEXIS 3631 (Aug. 11, 2020); *Little v. Reclaim Idaho*, No. 20A18, 2020 U.S. LEXIS 3585 (July 30, 2020); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020); *Merrill v. People First of Ala.*, No. 19A1063, 2020 U.S. LEXIS 3541 (July 2, 2020).

¹³⁹ 21-A M.R.S. § 751 (Westlaw through 2019 2d. Reg. Sess. of 129th Me. Leg. Sess.).

¹⁴⁰ 21-A M.R.S. § 752 (Westlaw through 2019 2d. Reg. Sess. of 129th Me. Leg. Sess.).

¹⁴¹ 21-A M.R.S. § 753-A (Westlaw through 2019 2d. Reg. Sess. of 129th Me. Leg. Sess.).

¹⁴² 21-A M.R.S. § 753-B (Westlaw through 2019 2d. Reg. Sess. of 129th Me. Leg. Sess.).

¹⁴³ 21-A M.R.S. § 755 (Westlaw through 2019 2d. Reg. Sess. of 129th Me. Leg. Sess.).

public polling places on election day, the Secretary of State released an absentee voting animation video that provides details on the absentee voting procedure in Maine.¹⁴⁴

CAN MAINE PLACE RESTRICTIONS ON TRAVEL INTO THE STATE?

RIGHT TO TRAVEL

The doctrine of the right to travel—on its face quite self-explanatory—actually encompasses three separate rights: (1) the right of United States citizens to move freely between states, (2) the entitlement of the citizen of one state to all “privileges and immunities” of the citizens of another state upon a temporary visit,¹⁴⁵ and (3) the right of a new citizen of a state to the same rights as existing citizens of the state.¹⁴⁶ Although the third right may also be implicated during the COVID-19 pandemic, it is the first two rights which are more directly invoked and potentially impacted by state travel restrictions in response to the pandemic.

Despite appearing nowhere in the Constitution or the Bill of Rights, the Supreme Court of the United States has consistently held that the right to travel is a fundamental right.¹⁴⁷ In *United States v. Guest*, the Court stated:

The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . . The right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.¹⁴⁸

In *Zemel v. Rusk*, the Court stated plainly that “the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstance be inhibited.”¹⁴⁹ The Court continued: “[the] freedom [to travel] does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a

¹⁴⁴ Maine Department of the Secretary of the State, *Absentee Voting in Maine: July 14, 2020 Election*, YOUTUBE (Jun. 5, 2020), <https://www.youtube.com/watch?v=wTcUTMTRI3E&feature=youtu.be>.

¹⁴⁵ U.S. CONST. art. IV, § 2. Privileges and Immunities Clause.

¹⁴⁶ Legal Information Institute, *The Right to Travel*, CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/the-right-to-travel> (last visited Aug. 27, 2020).

¹⁴⁷ See *Saenz v. Roe*, 526 U.S. 489 (1999); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966).

¹⁴⁸ *Guest*, 383 U.S. at 757–58.

¹⁴⁹ *Zemel v. Rusk*, 381 U.S. 1, 14 (1965).

whole.”¹⁵⁰ Though the Court was not then dealing with a global pandemic, these words seem custom tailored for current events. The protection of the public health, safety, and welfare from the threat of COVID-19 is unquestionably a compelling state interest, and if the right to free and unlimited travel is allowed to continue unfettered, it could have a direct impact on public health. But the specific question remains: can a state impose travel restrictions on citizens, preventing them from entering state borders, using the government interest of controlling the spread of COVID-19 as its compelling interest? The answer, in short: yes, it *can*, but the restriction achieving this goal must be narrowly tailored and must properly express the underlying reasons requiring any restrictions.

STATE QUARANTINE POWER

At the state level, the majority of states in the country have implemented some form of quarantine or other travel restrictions since the start of the pandemic.¹⁵¹ Some are broad and apply to all people—residents and non-residents—entering from other states, whereas others are targeted, only placing restrictions on those from specific states, or counter wise—only permitting unrestricted travel by those from specific states.¹⁵²

Through use of the police powers, it is state and local governments, not the federal government,¹⁵³ that are primarily responsible for maintaining public health and controlling the

¹⁵⁰ *Id.* at 16.

¹⁵¹ *Keep Maine Healthy*, STATE OF ME. OFF. OF THE GOVERNOR, <https://www.maine.gov/covid19/restartingmaine/keepmainehealthy> (last visited Aug. 27, 2020); *State Actions to Mitigate the Spread of COVID-19*, KAISER FAMILY FOUNDATION, <https://www.kff.org/other/state-indicator/state-actions-to-mitigate-the-spread-of-covid-19/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Mandatory%20Quarantine%20for%20Travelers%22,%22sort%22:%22asc%22%7D> (last visited Aug. 27, 2020).

¹⁵² *Id.*

¹⁵³ Though this article focuses on state quarantine powers, the federal government also has power to isolate and quarantine people in order to prevent the entry and spread of communicable diseases, and it derives this authority from the Commerce Clause found in Article I, § 8 of the United States Constitution. The power to isolate and quarantine people are included in the tools that the Secretary of Health and Human Services is authorized to use under section 361 of the Public Health Service Act (42 U.S.C. § 264), in order to prevent the entry and spread of communicable diseases from foreign countries into the United States and between the states. *Legal Authorities for Isolation and Quarantine*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Feb. 24, 2020), <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>.

Since the COVID-19 outbreak, the federal government has imposed travel restrictions on people arriving from another country, but no interstate travel restrictions are currently imposed on United States citizens. Jeff Thaler, *2020 Vision: What Can a Governor Do When the 2nd COVID-19 Surge Comes?* American Constitution Society (May 19, 2020),

spread of diseases within state borders.¹⁵⁴ Within their public health emergency statutes, every state has laws authorizing quarantine and isolation,¹⁵⁵ usually managed through the state’s health authority.¹⁵⁶

That a quarantine order imposed on those traveling across state borders burdens fundamental rights is almost without question, but, as alluded to above, this does not make the quarantine order automatically unconstitutional.¹⁵⁷ Because state police powers permit state governments to infringe citizens’ civil liberties where the public health, safety, and welfare demand such action, and in light of the public health emergency powers created by state legislatures and included under their public health statutes, any plaintiff challenging the constitutionality of the quarantine order will, essentially be arguing that the order is not necessary, or that, in its current form, it is too restrictive. The government will then need to show that there presently exists no less restrictive means for the state to slow or stop the spread of COVID-19.

MAINE COVID-19 TRAVEL RESTRICTIONS AND QUARANTINE ORDERS

In Maine, Governor Mills issued Executive Order No. 34 FY 19/20 on April 3, 2020 establishing quarantine restrictions on travelers arriving in Maine. The Executive Order does not operate as an outright ban on travel to the state, but it does impose restrictions. The Order states that “any person, resident or non-resident, traveling into Maine must quarantine for fourteen days

<https://www.acslaw.org/expertforum/2020-vision-what-can-a-governor-do-when-the-2nd-covid-19-surge-comes/>.

Instead, the Centers for Disease Control and Prevention (CDC) issued recommendations for those who do choose to travel, in an effort to encourage people to travel safely and, through the independent efforts of those travelers, to prevent the spread of COVID-19. Those recommendations include wearing a face mask in public, washing hands frequently, avoiding face touching, maintaining a six-foot distance from others, covering coughs and sneezes, and using drive-through services and curbside pickup at restaurants and stores where possible. *Travel during the COVID-19 Pandemic*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html>.

¹⁵⁴ *State Quarantine and Isolation Statutes*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 7, 2020), <https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx>.

¹⁵⁵ Though similar in purpose, isolation and quarantine are distinct in function. Isolation separates sick people with a communicable disease from people who are not sick, whereas quarantines separate and restrict the movement of people who are exposed to a contagious disease to see if they become sick. *Legal Authorities for Isolation and Quarantine*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Feb. 24, 2020), <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>.

¹⁵⁶ *Id.*

¹⁵⁷ *Cf. Bayley’s Campground Inc. v. Mills*, No. 2:20-cv-00176-LEW, 2020 U.S. Dist. LEXIS 94296, at *19–23 (D. Me. May 29, 2020) (holding that quarantine orders do infringe fundamental rights but that, at the present, the measure may be the least burdensome way to serve a compelling state interest, given all that is presently known). At the time this Guide was written, this case has been argued in front of the First Circuit and is awaiting decision.

or for the balance of fourteen days from the day of arrival.”¹⁵⁸ This Order was issued “to ensure the public health and health delivery system are capable of serving all, and to help protect those at the highest risk and vulnerability.”¹⁵⁹

On April 29, 2020, Governor Mills issued Executive Order No. 49 FY 19/20, which extended the effective dates of Executive Order 34 through May 31, 2020,¹⁶⁰ and implemented a “Restarting Plan” which will follow a data-based approach to governing the easing of COVID-19 related restrictions as the pandemic progresses.

Then, on June 9, 2020, Governor Mills issued Executive Order No. 57 FY 19/20 which repealed Executive Order 34, and imposed more flexible travel restrictions on “all persons, residents and non-residents of Maine, who travel into Maine from other states,” requiring that travelers either “receive a recent negative test for COVID-19 in accordance with standards established by Maine CDC and set forth in the Keep Maine Healthy plan, or [q]uarantine for [fourteen] days upon arrival in Maine.”¹⁶¹ In an effort to support the Maine hospitality and tourism industries and allow tourists to enjoy Maine’s incredible summer season, “[t]he Keep Maine Healthy plan represents a multilayered approach that aims to protect Maine people, protect visitors, and support Maine small businesses by reducing to the greatest extent possible COVID-19 risks associated with travel inherent in tourism.”¹⁶²

Prior to the issuance of Executive Order No. 57, a group of plaintiffs had filed a lawsuit challenging the Governor’s authority to impose a mandatory quarantine on those traveling into Maine from out of state.¹⁶³ The plaintiffs argued, *inter alia*, that the Governor’s Orders were an unlawful restriction on interstate travel.¹⁶⁴ The plaintiffs filed a motion for preliminary injunction, but the motion was denied.¹⁶⁵ In denying the motion, the federal District Court Judge acknowledged that “[t]aken together, the Orders significantly hinder both the ‘right of a citizen of one State to enter and to leave another State,’ and ‘the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State,’”¹⁶⁶ two of the three

¹⁵⁸ Me. Exec. Order No. 34 FY 19/20 (April 3, 2020).

¹⁵⁹ *Id.*

¹⁶⁰ Me. Exec. Order No. 49 FY 19/20 (April 29, 2020).

¹⁶¹ Me. Exec. Order No. 57 FY 19/20 (June 9, 2020).

¹⁶² *Keep Maine Healthy*, STATE OF ME. OFF. OF THE GOVERNOR, <https://www.maine.gov/covid19/restartingmaine/keepmainehealthy> (last visited Aug. 27, 2020).

¹⁶³ *Bayley’s Campground Inc.*, 2020 U.S. Dist. LEXIS 94296, at *1.

¹⁶⁴ *Id.* at *6.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at *22.

components of the right to travel recognized by the U.S. Supreme Court. However, the Judge found that “[p]laintiffs have not yet shown they are likely to succeed on [their] claim. It is not at all clear that there are any less restrictive means for the state to still meet their goal of curbing COVID-19, and Plaintiffs’ proposed alternatives are at least arguably unworkable.”¹⁶⁷ In short, without further consideration, and in light of the developing state of emergency caused by the spread of COVID-19, there was not yet enough evidence in the record to refute the State’s compelling interest, nor to indicate that the order is overly restrictive. As of August 11, 2020, this case is on appeal in the First Circuit Court of Appeals.

CAN MAINE RESTRICT THE OPERATION OF BUSINESSES WITHIN THE STATE?

INTRODUCTION

Not only has COVID-19 up-ended our personal lives, it has also had a significant impact on how businesses are able to operate. Due to the highly contagious nature of COVID-19, on March 18, 2020 Governor Mills signed an Executive Order that required all restaurants and bars to close dine-in facilities and only operate via takeout and to-go orders.¹⁶⁸ Governor Mills then signed an Executive Order that required all “non-essential” businesses to cease operations that were public-facing and could not be done in accordance with social distancing guidelines.¹⁶⁹ Further restrictions were put into place on March 31, 2020, when Governor Mills signed another Executive Order that required essential businesses to limit the amount of customers inside their stores and prioritize remote orders and “curbside pickup.”¹⁷⁰ On April 3, 2020, Governor Mills signed yet another Executive Order limiting the operation of lodging businesses which included a fourteen day quarantine for people coming from outside the state, designed to discourage people from coming into Maine and spreading COVID-19.¹⁷¹ Modification of previous restrictions, such as changing occupancy limits and unveiling the “Restarting Plan,” came via an Executive Order on April 29, 2020.¹⁷² One month later, on May 29, 2020, another Executive Order continued to

¹⁶⁷ *Id.* at *23.

¹⁶⁸ Me. Exec. Order No. 14 FY 19/20 (Mar. 18, 2020).

¹⁶⁹ Me. Exec. Order No. 19 FY 19/20 (Mar. 24, 2020).

¹⁷⁰ Me. Exec. Order No. 28 FY 19/20 (Mar. 31, 2020).

¹⁷¹ Me. Exec. Order No. 34 FY 19/20 (April 3, 2020). This Executive Order is also discussed in the context of the right to travel in the section titled “Can Maine place restrictions on travel into the state?”

¹⁷² Me. Exec. Order No. 49 FY 19/20 (April 29, 2020).

move the Restarting Plan forward and modified existing restrictions consistent with the Restarting Plan.¹⁷³ But are these restrictions constitutional?

CONSTITUTIONAL CHALLENGES

A. SUBSTANTIVE DUE PROCESS

There is no need to discuss the test for substantive due process challenges, as it has already been set out in the “Due Process Challenge Framework” section above,¹⁷⁴ so here we will jump straight into the case law. Several cases have already looked at the impact of substantive due process claims on COVID-19 restrictions. A federal court in Maine, in *Savage v. Mills*,¹⁷⁵ applied the *Jacobson* version of the substantive due process test, and found that the Executive Orders challenged¹⁷⁶ were related to public health and “harm to business interests . . . is not a ‘plain, palpable invasion of rights,’” meaning the Executive Orders were constitutional with regard to substantive due process.¹⁷⁷ In a case from North Carolina that challenged similar Executive Orders that limited the operations of businesses, the court did apply the traditional scrutiny-based test, and found that the ability to “conduct lawful business activities” has not been recognized as a fundamental constitutional right and the restrictions were able to pass the rational basis test, once again meaning the restrictions were constitutional.¹⁷⁸ The fact that challenges to COVID-19 restrictions were able to pass both the traditional test and the *Jacobson* test show courts’ hesitance to strike down COVID-19 restrictions on substantive due process grounds.¹⁷⁹

Applying the traditional scrutiny-based test for substantive due process as previously laid out,¹⁸⁰ the rights infringed by restricting business operations do not appear to be fundamental rights because there is not a deeply rooted right to conduct business without government regulation in

¹⁷³ Me. Exec. Order No. 55 FY 19/20 (May 29, 2020).

¹⁷⁴ *Supra* pp. 16-18.

¹⁷⁵ *Savage v. Mills*, No. 1:20-cv-00165-LEW, 2020 U.S. Dist. LEXIS 141628, at *1 (D. Me. Aug. 7, 2020). At the time this Guide was written, this case was on appeal to the First Circuit.

¹⁷⁶ *Supra* pp. 30-31. The plaintiffs in *Savage v. Mills* challenged essentially every Executive Order that restricted business operations in response to the COVID-19 pandemic.

¹⁷⁷ *Savage*, 2020 U.S. Dist. LEXIS 141628, at *22 (citation omitted).

¹⁷⁸ *Talleywhacker, Inc. v. Cooper*, NO. 5:20-CV-218-FL, 2020 U.S. Dist. LEXIS 99905, at *35 (E.D.N.C. June 8, 2020).

¹⁷⁹ *But see* *Cty. of Butler v. Wolf*, No. 2:20-CV-677, 2020 U.S. Dist. LEXIS 167544, at *1 (W.D. Penn. Sept. 14, 2020) (holding that business closures did violate the due process clause, as well as several other constitutional provisions). This decision is very much in the minority. Putting aside possible issues of standing and mootness, it is very unlikely that a court in Maine would follow this decision.

¹⁸⁰ *Supra* pp. 16-18.

our nation’s history. The case law discussed above also shows that courts have declined to give fundamental right status to “the right to do business.”¹⁸¹ Without the implication of a fundamental right the court will apply the rational basis test—the least demanding of the scrutiny levels. It is likely that a court would find Maine’s restrictions rationally related to the legitimate state interest of preventing the spread of COVID-19. Preventing the spread of COVID-19 has already been found to be a compelling state interest,¹⁸² so should easily satisfy the legitimate state interest standard required to pass the rational basis test.

Even if a court decides to apply the *Jacobson* test, as in *Savage v. Mills*,¹⁸³ it appears that the restrictions would still be upheld as constitutional. It is very unlikely for a court to find that restrictions of businesses based on COVID-19 are not related to the protection of the public health, but extremely arbitrary restrictions could open that door and be successfully challenged. Assuming the restrictions are not so arbitrary to be considered not related to the protection of the public health, they would then have to pass the second step, and not be a plain, palpable invasion of rights. As discussed previously in this section,¹⁸⁴ courts have not yet extended the definition of plain, palpable invasion of rights to include restricting some business operations, so unless another right is plainly invaded (such as speech or religion) the COVID-19 restrictions would likely be upheld.

B. PROCEDURAL DUE PROCESS

Also relevant to these issues is procedural due process, the other side of the due process coin. Procedural due process requires that the government give sufficient process before denying somebody a liberty or property interest. A liberty interest is—vaguely defined by the Supreme Court—an interest that is important to freedom,¹⁸⁵ which gives courts a lot of discretion when determining if a novel issue can be considered a liberty interest. A property interest is an interest based on expectations created by statutory law,¹⁸⁶ which lends itself to less discretion for courts when looking at a novel issue. Normally, procedural due process is not required unless the court determines that the denial implicated a liberty or a property interest. However, if a liberty or

¹⁸¹ *Supra* pp. 31-32.

¹⁸² *Infra* pp. 44-48. While the cases referenced here concern freedom of religion, the finding of controlling COVID-19 as a compelling interest is still helpful to our discussion of strict scrutiny via substantive due process.

¹⁸³ *Supra* pp. 30-31.

¹⁸⁴ *Supra* pp. 31.

¹⁸⁵ See generally *Sandin v. Conner*, 515 U.S. 472 (1995).

¹⁸⁶ *Bd. of Regents v. Roth*, 408 U.S. 564, 577-78 (1972).

property interest is denied, there is a three-factor balancing test—established in *Mathews v. Eldredge*—which must be used to determine if the process given by the government was sufficient. The court will look first to the importance of the interest; second to the risk of error and the value of more process; and third to the burden on the government interest in providing more process.¹⁸⁷

A few cases in Maine have already discussed the issue of procedural due process in the context of COVID-19 restrictions. In *Savage v. Mills*, the court found that there was no valid procedural due process claim against the Executive Orders discussed above¹⁸⁸ because the ability to do business did not qualify as a liberty or property interest, so no process was due to the plaintiffs.¹⁸⁹ In *Bayley's Campground Inc. v. Mills*, the court found that a procedural due process challenge to COVID-19 restrictions, specifically the fourteen day quarantine requirement for those coming into Maine from other states,¹⁹⁰ was unlikely to succeed because “[t]he Supreme Court has explained ‘summary administrative action may be justified in emergency situations,’” so individualized safeguards in the procedural due process context are lessened in times of emergency.¹⁹¹

In analyzing procedural due process, the case law discussed shows that it is unlikely for a liberty or a property interest to be found in these situations, therefore no due process will be afforded to the complainants. It is unlikely that any of the rights implicated here—such as the right to conduct business operations free of any restrictions from the government—would be found to be a liberty interest or a property interest because courts facing this issue thus far have refused to classify them as such.¹⁹² Following that, there would be no need to apply the *Mathews v. Eldridge* test to see if ample process was given, because no process was owed to those non-fundamental rights deprived in this scenario. In sum, a challenge to these restrictions that target business operations based on procedural due process grounds would likely fail and the restrictions would be found constitutional.

¹⁸⁷ *Mathews v. Eldredge*, 424 U.S. 319, 334-35 (1976).

¹⁸⁸ *Supra* pp. 30-31.

¹⁸⁹ *Savage*, 2020 U.S. Dist. LEXIS 141628, at *20-21.

¹⁹⁰ Me. Exec. Order No. 34 FY 19/20 (April 3, 2020); *supra* p. 30.

¹⁹¹ *Bayley's Campground, Inc.*, 2020 U.S. Dist. LEXIS 94296, at *31 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 299-300 (1981)).

¹⁹² *Supra* pp. 32.

C. DORMANT COMMERCE CLAUSE

The Dormant Commerce Clause is another issue that has been raised in litigation surrounding COVID-19 restrictions targeted at businesses. The United States Constitution gives Congress the power to “regulate commerce . . . among the several States.”¹⁹³ In the inverse, that Congressional power prevents states from regulating interstate commerce, which is commonly referred to as the Dormant Commerce Clause. Analyzing a challenge made via the Dormant Commerce Clause begins by looking at how the challenged law affects interstate commerce. The court will first determine whether the law directly discriminates against interstate commerce. A law can be directly discriminatory in two ways: it can be discriminatory on its face,¹⁹⁴ or it can be discriminatory in purpose and effect.¹⁹⁵ If the law does directly discriminate, it must then pass a two part test to be deemed constitutional: (1) the law must serve an important, non-economic interest (meaning that the law cannot be protectionist) and (2) there must be no less discriminatory alternatives.¹⁹⁶ On the other hand, if the law is neither facially discriminatory nor discriminatory in purpose and effect, the law must only avoid being unduly burdensome to be constitutionally valid. To determine whether a law is unduly burdensome it must be analyzed under the *Pike* balancing test, which weighs the law’s burden on interstate commerce against the local benefits that are protected by the law.¹⁹⁷

Throughout the country, several cases analyzing the constitutionality of COVID-19 restrictions as they apply to the Dormant Commerce Clause have already been decided. In a case from Maine challenging all of the Executive Orders discussed above,¹⁹⁸ the court found that the “threadbare allegations” could not support a challenge under the Dormant Commerce Clause, because the allegations failed to relate the impact on the businesses to interstate commerce.¹⁹⁹ In another case, this one from Maryland,²⁰⁰ the court found that an Executive Order that forced the closure of non-essential businesses, even if those businesses were involved in interstate commerce, was not, in fact, discriminatory against interstate commerce, and “[i]f anything, negatively impacts

¹⁹³ U.S. CONST. art. I, § 8.

¹⁹⁴ *Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978).

¹⁹⁵ *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333, 352-54 (1977).

¹⁹⁶ *Id.* at 353-54.

¹⁹⁷ *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

¹⁹⁸ *Savage*, 2020 U.S. Dist. LEXIS 141628, at *16; *supra* p. 30-31.

¹⁹⁹ *Savage*, 2020 U.S. Dist. LEXIS 141628, at *16.

²⁰⁰ *Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 U.S. Dist. LEXIS 88883, at *1 (D. Md. May 20, 2020).

intrastate commerce to a greater degree.”²⁰¹ Then, applying the *Pike* balancing test,²⁰² the court found that the impact on interstate commerce was “not clearly excessive in relation to local benefits.”²⁰³ The court went on to emphasize the importance of the state police power, even in conjunction with the Dormant Commerce Clause, because “[c]ourts enforcing the dormant Commerce Clause were ‘never intended to cut the States off from legislating on subjects relating to the health, life, and safety of their citizens.’”²⁰⁴

Thus, in analyzing a challenge brought in this context, the first question is whether or not interstate commerce is discriminated against, either facially or in effect. None of the restrictions Maine has put in place so far have facially discriminated against interstate commerce, as they all reference only businesses operating in the state of Maine. Further, there is nothing to show that the restrictions have discriminated in effect against interstate commerce. Therefore, these restrictions will only violate the Dormant Commerce Clause if they create an undue burden on interstate commerce. Similar to *Antietam Battlefield KOA v. Hogan*,²⁰⁵ it appears that these restrictions would have more of a burden on Maine businesses, not interstate businesses. Applying the *Pike* balancing test, the burdens on interstate commerce are very minimal when compared to the local benefits, which are substantial—preventing the spread of COVID-19 in Maine. Therefore, it is unlikely that these restrictions would be found unconstitutional under the Dormant Commerce Clause.

D. FIFTH AMENDMENT TAKINGS

Finally, turning to the Fifth Amendment Takings Clause, the United States Constitution asserts that the government cannot take private property from someone “for public use, without just compensation.”²⁰⁶ Normally, takings arise under the context of eminent domain, but occasionally government regulations that impact property use can be challenged as a regulatory taking; however, not every regulation that affects property constitutes a taking.²⁰⁷ Recent Supreme Court case law tells us that there will be a regulatory taking if the regulation results in a denial of

²⁰¹ *Id.* at *37-38.

²⁰² *Supra* p. 34.

²⁰³ *Antietam Battlefield KOA*, 2020 U.S. Dist. LEXIS 8883, at *40.

²⁰⁴ *Id.* (quoting *Colon Health Centers of Am., LLC v. Hazel*, 813 F.3d 145, 158 (4th Cir. 2016)). (*KOA v. Hogan*)

²⁰⁵ *Supra* p. 34.

²⁰⁶ U.S. CONST. amend. V.

²⁰⁷ *See generally* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (discussing *per se* regulatory takings).

all economically productive use of the land.²⁰⁸ But, if a regulation does not deny all economically productive use of the land then a three factor balancing test will be applied to determine whether a taking has occurred. The court will consider “(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action.”²⁰⁹

So far, Fifth Amendment Takings challenges have been unsuccessful in the context of COVID-19. In *Savage v. Mills*, the Fifth Amendment Takings claim challenging the Executive Orders that limited business operations²¹⁰ was dismissed because the “inability to sell goods and services” was not found to be an interference with property.²¹¹ A North Carolina court found that a Fifth Amendment takings claim was unlikely to succeed.²¹² In dismissing the case, the court provided minimal explanation, possibly suggesting that Fifth Amendment Takings claims regarding COVID-19 restrictions on business operations are unlikely to find much support. Finally, an Arizona court found that even if a taking had occurred, injunctive relief was not appropriate because “damages are the proper remedy for a taking.”²¹³

Maine’s restrictions on business operations appear to be constitutional even when challenged as a taking under the Fifth Amendment. Because Maine’s restrictions have eased since the start of the COVID-19 pandemic, it is clear that they do not deny all economically productive use of the land, therefore, the three-factor balancing test must be applied. Turning to the first factor—the economic impact of the regulation—although business operations have certainly been impacted, that impact has been minimized as the restrictions have eased, and most business are now permitted to operate so long as they adhere to social distancing guidelines. The second factor—the impact on investment-backed expectations—weighs in favor of the business owners, because business owners could not have anticipated dramatic reductions in occupancy limitations, nor could they have anticipated having to comply with social distancing guidelines. Lastly, and most importantly, the third factor—character of the government action—weighs heavily in favor of the government, because these regulations have been put in place to control the spread of

²⁰⁸ *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (citation omitted).

²⁰⁹ *Id.* at 1943.

²¹⁰ *Supra* pp. 30-31.

²¹¹ *Savage*, 2020 U.S. Dist. LEXIS 141628, at *25-26.

²¹² *Talleywhacker, Inc.*, 2020 U.S. Dist. LEXIS 99905, at *1.

²¹³ *Xponential Fitness v. Arizona*, No. CV-20-01310-PHX-DJH, 2020 U.S. Dist. LEXIS 123379, at *1 (D. Az. July 14, 2020).

COVID-19 and protect the public health. Because the third factor is such a heavy weight in favor of the government action, it is very likely that these restrictions would be upheld as constitutional in the face of a Fifth Amendment takings challenge.

MOVING FORWARD

In the end, where does all of this leave us? First, as restrictions continued to be lifted, most challenges will become moot and will be dismissed before the court has the chance to rule on the constitutionality of the restrictions as challenged. However, if Maine experiences a renewed spike in cases this fall or winter, and new restrictions are put into effect, challenges to these restrictions will become timely once again.

The key to a restriction being upheld as constitutional is really in the quality of the writing. Avoiding discrimination against interstate commerce on the face of the restriction ensures that a heightened scrutiny will not be triggered when the Dormant Commerce Clause is being implicated. Heightened scrutiny under the Dormant Commerce Clause can also be avoided by not targeting certain areas of commerce that would lead to a discriminatory effect on interstate commerce. However, if targeting a certain area of commerce that would lead to a discriminatory effect is backed up by strong non-protectionist purposes and evidence, and without less discriminatory options, a court challenge should be defeated. There is, however, a chance that facially discriminatory restrictions could be put in place. For example, consider a scenario where Maine restricted travel from a specified state that was experiencing a serious COVID-19 outbreak. While a restriction of that nature is more the subject of Section IV.B (“Can Maine place restrictions on travel into the state?”), it also applies here because the restriction facially discriminates against interstate commerce. This restriction may still be constitutional in regard to the Dormant Commerce Clause, though, because it definitely passes the first step of the *Pike* balancing test since it was not imposed as a protectionist restriction. From there, its constitutionality would hinge on if there were less discriminatory means available, which there potentially could be in the form of a mandatory quarantine upon arrival. Therefore, a restriction of that nature would not have the best chances of being constitutional.

In the due process context, future restrictions should have no problem with constitutionality so long as they do not implicate actual fundamental rights. Given the unwillingness of courts to declare the right to do business a fundamental right, unless a recognized fundamental right is also

infringed by these restrictions, they will continue to receive the rational basis test. Restrictions will almost surely pass the rational basis test as long as COVID-19 is still a threat to public health. Should these restrictions somehow receive strict scrutiny, however, they will need to be well written to be considered narrowly tailored, because as more areas of our society are allowed to reopen, the reasons for keeping certain areas closed must be compelling. Procedurally, these restrictions should not face many issues, because the right to conduct business is not a liberty or property interest, and therefore will not trigger the *Mathews* procedural due process test. Further, courts show significant deference to government actions taken to protect the public health, as mentioned by the court in *Bayley's Campground, Inc. v. Mills*.²¹⁴

Lastly, restrictions that regulate the operation of businesses will likely not be classified as an unconstitutional taking so long as they don't deny all economically productive use of the land. As long as COVID-19 is still a threat to public health, the three-factor balancing test will likely favor the government restriction and it is unlikely for it to be found to be a regulatory taking. Well written restrictions that allow businesses to operate in some capacity, while still targeting the prevention of the spread of COVID-19, are unlikely to be found unconstitutional.

CAN MAINE MANDATE THE USE OF FACE COVERINGS?

INTRODUCTION

Another hot-button issue that has been raised in response to COVID-19 restrictions is the constitutionality of mask mandates. Medical professionals around the world have come to a fairly strong consensus that wearing masks or face coverings can help prevent the spread of COVID-19. This determination is based on the assertion that the masks prevent the wearer from exhaling respiratory droplets into the surrounding area.²¹⁵ Nearly every state in America has instituted a mask wearing requirement for a variety of specified situations, the most common of which is when social distancing is not possible.²¹⁶ Maine is among those states that require masks in public spaces. Governor Mills signed an Executive Order on April 29, 2020 that requires individuals to “wear cloth face coverings in public settings where other physical distancing measures are difficult to

²¹⁴ *Supra* p. 33.

²¹⁵ Mayo Clinic Staff, *COVID-19: How much protection do face masks offer?*, MAYO CLINIC (Aug. 20, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-mask/art-20485449#:~:text=Yes%2C%20face%20masks%20combined,spread%20of%20the%20disease>.

²¹⁶ Ella Torres, *Which US states require masks and which 2 don't at all?*, ABC NEWS (July 22, 2020), <https://abcnews.go.com/Health/us-states-require-masks/story?id=71472434>.

maintain.”²¹⁷ Later, on May 29, 2020, another Executive Order was issued requiring individuals to wear masks at large gatherings, even those taking place outside.²¹⁸ Governor Mills’s latest Executive Order pertaining to masks came on July 8, 2020, and requires certain businesses to enforce the mask wearing mandate as necessary, including by denial of entry or service.²¹⁹

CONSTITUTIONAL CHALLENGES

A. SUBSTANTIVE DUE PROCESS

The main challenge that could be made towards a mask mandate would be substantive due process: a claim that says it violates a fundamental right and cannot pass strict scrutiny. To date, no cases have been brought in Maine to challenge the mask mandate originally set out in Executive Order 49. Unfortunately, there is a limited amount of case law pertaining to this issue. Of note is a case brought in Florida, which has yet to be decided.²²⁰ The plaintiffs claim that being forced to wear masks in public—by a county-wide mask mandate—infringes their right to privacy, bodily autonomy, and their “right to enjoy and defend life and liberty.”²²¹ Furthermore, of the few relevant cases that have been decided, many do not, in fact, challenge the constitutionality of mask mandates, but instead ask if certain government officials had the requisite power to pass such laws.²²² However, a recent Virginia case does challenge a statewide mask mandate (which is very similar to Maine’s mask mandate) on substantive due process ground.²²³ The court did not apply the traditional substantive due process test, but instead applied a test arising from *Jacobson*.²²⁴ Applying this test, the court found that being forced to wear a mask “relate[s] directly” to Virginia’s goal of stopping the spread of COVID-19, and that the order to wear a mask was “not ‘beyond all question, a plain, palpable invasion of rights,’” and therefore the mandate was upheld as constitutional.²²⁵

²¹⁷ Me. Exec. Order No. 49 FY 19/20 (April 29, 2020).

²¹⁸ Me. Exec. Order No. 55 FY 19/20 (May 29, 2020).

²¹⁹ Me. Exec. Order No 2 FY 20/21 (July 8, 2020).

²²⁰ John E. Finn, *The Constitution doesn’t have a problem with mask mandates*, THE CONVERSATION (July 22, 2020), <https://theconversation.com/the-constitution-doesnt-have-a-problem-with-mask-mandates-142335>.

²²¹ *Id.*

²²² See generally *Strother v. Northam*, No. CL20-26Q, 2020 Va. Cir. LEXIS 106, at *1 (Va. Cir. Ct. June 29, 2020).

²²³ *Tigges v. Northam*, No. 3:20-cv-410, 2020 U.S. Dist. LEXIS 131592, at *1 (E.D. Va. July 21, 2020).

²²⁴ *Id.* at *18-19.

²²⁵ *Id.*

Applying the substantive due process test as set out above,²²⁶ it is likely that all mask mandates challenged as an infringement of a fundamental right would be upheld as constitutional. First, when determining if there is a fundamental right in this context, it seems very unlikely that any court would find that there is a fundamental right to be in public without wearing a mask during a pandemic. There is an argument to be made that there is a fundamental right to bodily autonomy and privacy which encompasses not wearing a mask, but precedent shows that the Supreme Court demands a more narrowly defined right,²²⁷ so such a broad definition is unlikely to be accepted and therefore will not trigger strict scrutiny.

If strict scrutiny is not triggered, the court will instead apply the rational basis test, and here again, preventing the spread of COVID-19 is very clearly a legitimate state interest. In light of the scientific evidence suggesting that the use of masks or face coverings does help to prevent the spread of COVID-19,²²⁸ it certainly appears that mask mandates would be rationally related to that legitimate state interest. Like most other COVID-19 restrictions, it is very likely that mask mandates would have no issue passing the rational basis test.

However, even if the court did apply the strict scrutiny analysis, a mask mandate may still be upheld as constitutional. As shown by several cases discussed throughout this Guide,²²⁹ courts have been willing to classify actions targeting the prevention of the spread of COVID-19 as a compelling state interest, and there is no reason to suggest that willingness would not extend to mask wearing mandates. As to the narrow tailoring of the mandate, even an expansive mask wearing mandate would likely satisfy this requirement because science suggest that even people who are asymptomatic can spread the virus. Without the ability to identify those who are and are not likely to spread the virus, the mask mandate can only be narrowly tailored to a certain degree. As long as the mask requirement is crafted such that it includes exceptions for those with valid medical concerns,²³⁰ it would likely satisfy the strict scrutiny analysis. In sum, mask mandates seem very likely to withstand a substantive due process challenge and be upheld as constitutional.

²²⁶ *Supra* pp. 16-18.

²²⁷ *See* *Washington v. Glucksberg*, 521 U.S. 702, 723-24 (1997).

²²⁸ Mayo Clinic Staff, *COVID-19: How much protection do face masks offer?*, MAYO CLINIC (Aug. 20, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-mask/art-20485449#:~:text=Yes%2C%20face%20masks%20combined,spread%20of%20the%20disease.>

²²⁹ *Infra* pp. 44-48.

²³⁰ It is possible that exceptions for medical reasons would be necessary to be compliant with the ADA, but that is outside of the scope of this Guide and not pertinent to substantive due process, and therefore will not be discussed here.

B. FIRST AMENDMENT EXPRESSIVE CONDUCT

The only other relevant area of constitutional law that is implicated in the context of a mask mandate is the First Amendment’s protection of expressive conduct. The First Amendment to the United States Constitution prevents governments from “abridging the freedom of speech,”²³¹ one of the core tenets of American society and history. This protection has been construed to also extend to expressive conduct, and only allows restriction of expressive conduct under certain circumstances.²³² However, recent case law has refused to extend the definition of expressive conduct to include wearing a mask to prevent the spread of COVID-19.²³³ In response to a challenge to a mask mandate similar to Maine’s, a Maryland court found that “especially in the context of COVID-19, wearing a face covering would be viewed as a means of preventing the spread of COVID-19, not as expressing any message.”²³⁴

MOVING FORWARD

In conclusion, it is very unlikely that a mask mandate would be found unconstitutional under substantive due process grounds, and extremely unlikely that a mask mandate would be found to be an unconstitutional restriction of free speech. Further, with current scientific evidence suggesting that wearing a face covering is an effective means of preventing the spread of COVID-19, the rational basis test should be easily satisfied. It is worth noting that, as more scientific data become available, mask mandates may need to adapt and evolve accordingly.

WHAT CAN MAINE DO WITH RESPECT TO RELIGIOUS GATHERINGS?

FREEDOM OF RELIGION

Another key constitutional issue facing legislators and policy makers when responding to the COVID-19 pandemic is the freedom of religion—a right explicitly laid out in the First Amendment. Religious freedom is ensured by the First Amendment, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”²³⁵ This section will offer guidance on how to respond to COVID-19 while staying within

²³¹ U.S. CONST. amend. I.

²³² See generally *Texas v. Johnson*, 491 U.S. 397 (1989).

²³³ *Antietam Battlefield KOA*, 2020 U.S. Dist. LEXIS 8883, at *31-32.

²³⁴ *Id.* at 32.

²³⁵ U.S. CONST. amend. I.

the constitutional boundaries of the First Amendment by presenting statutes and relevant case law that directly impact how governments can restrict religious freedom during a public health emergency. Religious freedom is different from the other rights discussed in this Guide. Whereas the other rights discussed mainly receive protection (or do not receive protection) from the due process clauses found in the Fifth and Fourteenth Amendments, religious freedom finds its protection specifically enumerated in the First Amendment. Therefore, the traditional due process tests that were applied in every other section do not apply here, as precedent has established tests that are specific to religious freedom.

Under the Federal Constitution, freedom of religion is essentially broken down into two major areas: The Free Exercise Clause and the Establishment Clause. While the Establishment Clause has been implicated in several recent cases regarding COVID-19 restrictions on religious gatherings,²³⁶ the majority of the cases have focused on the Free Exercise Clause, and therefore this section will share that focus. It is important to note that deference will likely be shown to government measures to a certain extent, because when a government is faced with a great danger they are allowed to restrain normal liberties—including freedom of religion—“as the safety of the general public may demand.”²³⁷ More specifically, “[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease.”²³⁸ These two quotes show that the right of religious freedom is not absolute and that the Supreme Court has indicated in the past that it would be amenable to restrictions on religious freedom in responding to a public health emergency like the COVID-19 pandemic.

The actions that Maine has taken that impact religious exercise fall mainly in two camps: (1) limits on gatherings and (2) stay at home orders. On March 18, 2020 Governor Janet Mills signed an Executive Order limiting gatherings—including faith-based gatherings—to ten people or less.²³⁹ The limit on gatherings was increased to fifty people with an Executive Order on May 29, 2020.²⁴⁰ Governor Mills also signed an Executive Order on March 31, 2020 that ordered Maine citizens to only leave their residences for “essential” business purposes or “essential” travel.²⁴¹

²³⁶ See generally *Spell v. Edwards*, No. 20-00282-BAJ-EWD, 2020 U.S. Dist. LEXIS 85909, at *11 (M.D. La. May 15, 2020); *Lighthouse Fellowship Church v. Northam*, No. 2:20CV204, 2020 U.S. Dist. LEXIS 80289, at *27-28 (E.D. Va. May 1, 2020).

²³⁷ *Jacobson*, 197 U.S. at 27.

²³⁸ *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

²³⁹ Me. Exec. Order No. 14 FY 19/20 (Mar. 18, 2020).

²⁴⁰ Me. Exec. Order No. 55 FY 19/20 (May 29, 2020).

²⁴¹ Me. Exec. Order No. 28 FY 19/20 (March 31, 2020).

The order only listed out a few exceptions for what was deemed “essential,” none of which directly mentioned religious gathering or religious exercise. While no Executive Orders have directly addressed drive-through religious gatherings, Phase 1 of the Restarting Plan did allow for drive-through religious gatherings, as long as other safety precautions were practiced.²⁴²

CONSTITUTIONAL CHALLENGES

A. THE FEDERAL CONSTITUTION TEST—SMITH

The Free Exercise Clause—the portion of the First Amendment that says “Congress shall make no law . . . prohibiting the free exercise thereof”²⁴³—has a large impact on government responses to the COVID-19 pandemic. It is important to note that the First Amendment applies to not only the federal government, but also to state governments through the Fourteenth Amendment.²⁴⁴ The basic groundwork to determine if a law is constitutional in regard to the Free Exercise Clause is as follows: any law that is neutral and generally applicable will only need to pass the rational basis test (the law is rationally related to a legitimate government interest²⁴⁵), while laws that are not neutral and generally applicable—therefore restricting practices because of their religious motivation—must pass strict scrutiny (“justified by a compelling interest and . . . narrowly tailored to advance that interest”²⁴⁶).²⁴⁷

To receive the rational basis test, a law must be *both* neutral and generally applicable, though the two often go hand-in-hand. For a law to be neutral, it cannot discriminate against religion on its face, nor can the law’s object be to “infringe upon or restrict practices because of their religious motivation.”²⁴⁸ While understanding the “object” of a law can be difficult, the Supreme Court advises that “the effect of a law in its real operation is strong evidence of its object.”²⁴⁹ For a law to be generally applicable, it may be “selective to some extent” but “cannot in a selective manner impose burdens only on conduct motivated by religious belief.”²⁵⁰ While

²⁴² See Me. Exec. Order No. 49 FY 19/20 (April 29, 2020).

²⁴³ U.S. CONST. amend. I.

²⁴⁴ *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

²⁴⁵ *Romer*, 517 U.S. at 631.

²⁴⁶ *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 529-33 (1993); see also *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

²⁴⁷ The rational basis test and the strict scrutiny test are also discussed in the “Due Process Challenge Framework” section of this Guide. *Supra* p. 17.

²⁴⁸ *Church of Lukumi Babalu Aye*, 508 U.S. at 533.

²⁴⁹ *Id.* at 535.

²⁵⁰ *Id.* at 542, 543.

there is room for some exceptions, courts view exceptions for analogous secular conduct negatively.²⁵¹ Conduct is analogous “if it harms or undermines the same or similar government interests.”²⁵² If a law is not both neutral *and* generally applicable, then it will need to pass strict scrutiny to be valid under the United States Constitution.

Challenges to COVID-19 restrictions based on the United States Constitution’s protection of free exercise is, thankfully, a fairly heavily litigated area. Specifically in Maine, a motion by the Calvary Chapel of Bangor to enjoin Maine from enforcing a ban on gatherings over ten people²⁵³—which included religious services—was denied by a federal District Court.²⁵⁴ The court found that the ban was neutral because it “prohibit[s] all non-essential gatherings of more than ten people,” not just religious gatherings of more than ten people.²⁵⁵ The ban was also found to be generally applicable because the exceptions were not selective, but instead the ban was imposed “equally on all types of conduct that are likely to spread COVID-19.”²⁵⁶ Following that, the ban passed the rational basis test, as the interest in stopping the spread of COVID-19 was easily sufficient.²⁵⁷ It is worth noting that the court here also speculated that these bans, while not held to strict scrutiny, could likely pass strict scrutiny because of the fact that the interest in stopping the pandemic is very compelling.²⁵⁸

The Supreme Court of the United States has also decided a similar case, denying an application for injunctive relief against a similar ban on gatherings in California.²⁵⁹ While this was without opinion, Chief Justice Roberts did pen a concurrence, explaining some of the reasoning. The concurrence focused mainly on *Jacobson* and was not clear on whether *Jacobson* was being read to enhance the police powers during an emergency, or if the ban would have been upheld via *Jacobson* as a public health law during a time of a lesser emergency.²⁶⁰ Following this, Chief

²⁵¹ Douglas Laycock, *Generally Applicable Law & The Free Exercise of Religion*, 95 NEB. L. REV. 1, 27 (2016)

²⁵² *Id.*

²⁵³ *Supra* p. 44.

²⁵⁴ *Calvary Chapel of Bangor v. Mills*, No. 1:20-CV-00156-NT, 2020 U.S. Dist. LEXIS 81962, at *2 (D. Me. May 9, 2020). This denial was affirmed on appeal to the First Circuit. *Calvary Chapel of Bangor v. Mills*, No. 20-1507, 2020 U.S. App. LEXIS 18406, at *2 (1st Cir. June 2, 2020). At the time this Guide was written, this case has been argued in front of the First Circuit and is awaiting decision.

²⁵⁵ *Calvary Chapel of Bangor*, 2020 U.S. Dist. LEXIS 81962, at *19-20.

²⁵⁶ *Id.* at *22-22.

²⁵⁷ *Id.* at *22.

²⁵⁸ *Id.* at *24, n.17.

²⁵⁹ *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613. The ban at issue here limited places to 25% capacity or maximum 100 people, as opposed to the ten-person limit involved in the other cases discussed.

²⁶⁰ *Id.* at 1614 (Roberts, C.J., concurring).

Justice Roberts—without doing a deep analysis—said that the ban appeared to be valid under the Free Exercise Clause, as there were “[s]imilar or more severe restrictions appl[ied] to comparable secular gatherings.”²⁶¹ Without using the explicit language, it appears that the concurrence here is saying that the ban was neutral and generally applicable, and would likely pass the rational basis test.

The Supreme Court also decided on a second challenge to COVID-19 restrictions that had to do with religious freedom, once again denying injunctive relief against COVID-19 restrictions.²⁶² Along with having no majority opinion, there was no concurring opinion but three dissents, from Justices Gorsuch, Kavanaugh, and Alito. Gorsuch, in a very brief dissent, wrote that “there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.”²⁶³ Alito, in discussing both this case and the *South Bay United Pentecostal Church* case, differentiated the two cases by writing that this case was about analogous secular conduct, while the previous case might not have been.²⁶⁴ While not controlling, the dissents show that as more businesses are allowed to open, states must continue to have compelling reasons that are narrowly tailored to treat religious activity differently than secular activity.

While not controlling in regard to Maine law, there have been other decisions like these from other courts around the country. A Virginia federal District Court recently denied a temporary restraining order and preliminary injunction against a ban on gatherings above ten people, sought by a church’s pastor who was given a criminal citation for holding a service with more than ten people in attendance.²⁶⁵ In that case, the court held that the ban was neutral because it did not appear to discriminate against religion—even giving religion favorable treatment by deeming it “essential” and allowing church gatherings under ten people—and that the ban was generally applicable because it was not underinclusive and the exceptions were “carved out for specific reasons to avoid harms equal to or greater than the spread of this deadly pandemic.”²⁶⁶

A Colorado federal District Court similarly denied a request for an injunction against a stay-at-home order, sought by a citizen who wished to attend church in person and receive

²⁶¹ *Id.*

²⁶² *Calvary Chapel Dayton Valley v. Sisolak*, 591 U.S. ____ (2020). This case involved a challenge to an Executive Order that allowed businesses like casinos to operate at fifty percent capacity but limited religious gatherings to fifty people no matter the size of the building.

²⁶³ *Id.* at 1 (Gorsuch, J., dissenting).

²⁶⁴ *Id.* at 10 (Alito, J., dissenting).

²⁶⁵ *Lighthouse Fellowship Church*, 2020 U.S. Dist. LEXIS 80289, at *1.

²⁶⁶ *Id.* at *25.

communion in person.²⁶⁷ The religious freedom claim in that case fell short because the plaintiff lacked standing for a religious freedom claim,²⁶⁸ but analysis of other claims in that case showed that the court held curbing the COVID-19 pandemic to be a compelling interest and that *Jacobson* applied by enhancing the power of the government during times of emergency.²⁶⁹

A federal District Court in Louisiana also denied a request for a temporary restraining order and preliminary injunction against a ban on gatherings of ten or more people.²⁷⁰ In a case involving a pastor seeking to hold in person service with his entire 2,000 person congregation, the court found that the ban was neutral because it did not discriminate against religious exercise and it had the neutral, secular goal of preventing the spread of COVID-19.²⁷¹ Without explicitly saying so, the court also found the ban to be generally applicable, as shown by the fact that they did not apply strict scrutiny to this ban.²⁷² The court continued by describing the seriousness of the COVID-19 pandemic, hinting that the state interest here was so important it might even have defeated strict scrutiny, and finding that the plaintiffs “fail[ed] to demonstrate that their rights, *which are not absolute*, outweigh the lives and health of Louisiana's population.”²⁷³

Some cases have been decided the other way, however. A Kentucky federal District Court recently granted a request for a temporary restraining order and injunctive relief against the Louisville mayor's ban on drive-in church services.²⁷⁴ The court there found that the ban was not neutral or generally applicable because the governor singled out drive-through church services while allowing other activities such as drive-through restaurants, drive-through liquor stores, and parking in parking lots.²⁷⁵ Following that finding, the court applied strict scrutiny and found the ban unlikely to be narrowly tailored, as it is “underinclusive because [it doesn't] prohibit a host of

²⁶⁷ *Lawrence v. Colorado*, No. 1:20-CV-00862-DDD-SKC, 2020 U.S. Dist. LEXIS 92910, at *1 (D. Colo. Apr. 19, 2020).

²⁶⁸ *Id.* at *15-16. The plaintiff lacked standing because the church cancelled in person mass before the order, not because of the order, so his injury was not traceable to the government action nor was it redressable.

²⁶⁹ *Id.* at *18-19.

²⁷⁰ *Spell*, 2020 U.S. Dist. LEXIS 85909, at *2. This case was later invalidated on appeal because the claim had become moot, *Spell v. Edwards*, No. 20-30358, 2020 U.S. App. LEXIS 19148, at *2 (5th Cir. June 18, 2020), but the analysis of the freedom of religion claims remain helpful for our purposes.

²⁷¹ *Spell*, 2020 U.S. Dist. LEXIS 85909, at *9.

²⁷² *Id.* at *10-11.

²⁷³ *Id.* at *13 (emphasis added).

²⁷⁴ *On Fire Christian Center v. Fischer*, No. 3:20-CV-264-JRW, 2020 U.S. Dist. LEXIS 65924, at *1-2 (W.D. Kent. Apr. 11, 2020).

²⁷⁵ *Id.* at *11-12.

equally dangerous (or equally harmless) activities that [the city] has permitted on the basis that they are ‘essential.’”²⁷⁶

Lastly, a federal judge in New York granted a request for a preliminary injunction against limiting outdoor religious gatherings or indoor religious gatherings to a greater extent than any other Phase 1 or 2 business.²⁷⁷ The court there found that the ban was not generally applicable, because secular businesses that posed equivalent risks were treated better and individualized exemptions were created for graduation ceremonies and protests.²⁷⁸ The court then found it was unlikely that the ban would pass strict scrutiny, because the general interest in stopping the spread of COVID-19 was not narrowly tailored enough and it was underinclusive.²⁷⁹

The ten-person limit that Maine implemented has already been challenged in court, as discussed above, and a motion to enjoin enforcement was denied.²⁸⁰ It is likely that any of the restrictions already put into place in Maine would be upheld in a court of law should they be challenged. Applying the *Smith* test, all of the restrictions in place appear to be both neutral and generally applicable. No restrictions have had the goal of restricting religion, and none discriminate solely against religion on their face, making them neutral. They appear to be generally applicable as well, because there are basically no individualized exceptions and the exceptions that are laid out are not for analogous secular conduct. As discussed above with *Calvary Chapel of Bangor v. Mills*, walking through a grocery store and then leaving after purchasing your items is not analogous to sitting in a church pew for more than an hour. Following that logic, the restrictions would all likely be held to the rational basis test, and they would likely pass, due to the reasons discussed above when the Maine District Court found that they actually did pass the rational basis test.²⁸¹ Even if, in an unlikely scenario, strict scrutiny is applied, these restrictions seem well inclined to be upheld as constitutional, as controlling the spread of COVID-19 would likely be found to be a compelling government interest, and at this point the scope of the restrictions appear to be as narrowly tailored as possible under the circumstances. As more information becomes

²⁷⁶ *Id.* at *13.

²⁷⁷ *Soos v. Cuomo*, No. 1:20-CV-651 (GLS/DJS), 2020 U.S. Dist. LEXIS 111808, at *2 (N.D. N.Y. June 26, 2020). Phase 1 businesses were allowed to use 50% of their capacity and Phase 2 businesses were allowed to use 25% of their capacity, and the limits on outdoor services was set at twenty-five people.

²⁷⁸ *Id.* at *26-29. Much of the discussion on individualized exemptions for protests focused on Governor Cuomo and Mayor de Blasio’s public comments regarding the protests and the lack of enforcement against the protests, whereas the bans themselves did not actually “exempt” protests.

²⁷⁹ *Id.* at *33.

²⁸⁰ *See supra* pp. 44-45. It is worth noting, however, that appeal is pending in the First Circuit.

²⁸¹ *See supra* pp. 44-45.

available and more things are allowed to open back up, restrictions must be able to adapt so they can continue to be narrowly tailored.

B. THE MAINE CONSTITUTION TEST—*BLOUNT*

A challenge to a law under the Maine Constitution²⁸² would be handled differently. While some states have passed laws to require a stricter test when religious exercise is burdened, Maine has not followed this trend and has no law on the books to require a stricter test.²⁸³ The Maine Constitution does, however, require a slightly stricter test for a law to be valid under its religious freedom section,²⁸⁴ with the Maine Law Court setting out a four-factor test for laws of general applicability.²⁸⁵ The activity burdened must be motivated by a sincerely-held religious belief, the challenged regulation must restrain the free exercise of that sincerely held belief, and then the challenged regulation must be motivated by a compelling interest, and no less restrictive means could be used to adequately achieve the compelling interest.²⁸⁶ Having two separate tests can be confusing on its face, but can be explained most simply like this: two different tests apply for different types of challenges to the same law, one test regarding a challenge to the United States Constitution and one test regarding a challenge to the Maine Constitution.²⁸⁷ Thus, if a law is challenged in Maine as violating the Free Exercise Clause, the law will need to pass the test laid out in *Smith* with regard to the United States Constitution, and pass the test laid out in *Blount* with regard to the Maine Constitution. In the context of the COVID-19 pandemic, these same rules apply to challenges to COVID-19 restrictions on religious exercise, possibly with a good deal of deference given to the government action as described in *Jacobson*.

Unfortunately, there is no case law to date that applies the *Blount* test to a COVID-19 restriction, as the only Maine case challenging any restrictions on religious freedom grounds is the

²⁸² While it is not necessary when challenging a Maine law, it is safe to assume that any challenge would challenge the law against both the United States Constitution and the Maine Constitution. The Maine Law Court has held that “the rights guaranteed by the United States Constitution and the Maine Constitution are coextensive,” meaning that a claim against a law as to one can also be brought as to the other. *Bagley v. Raymond Sch. Dep’t*, 1999 ME 60, ¶ 13, 728 A.2d 127.

²⁸³ Maine has attempted to pass a law like this, but it died in the House and did not become a law. L.D. 1428, Summary (126th Legis. 2014).

²⁸⁴ ME. CONST. art. I, § 3.

²⁸⁵ *Blount v. Dep’t of Educ. & Cultural Servs.*, 551 A.2d 1377, 1379 (Me. 1988).

²⁸⁶ *Id.*

²⁸⁷ *Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57, ¶¶ 41-61, 871 A.2d 1208.

one discussed above,²⁸⁸ and that case only applies the *Smith* test. However, applying the *Blount* test to COVID-19 restrictions like the ones already in place would likely find them constitutional. First, the activity that is burdened by these restrictions—attending religious gatherings in person, in groups of more than ten—is definitely motivated by sincerely held religious beliefs. The second step of the *Blount* test, however, could possibly go either way depending on the court hearing the case and the persuasiveness of the counsel on either side. On one hand, it could be found that the restrictions do restrain free exercise of belief because not allowing the congregation to meet in person may deny some believers a central tenet of their religion. On the other hand, it could be found that the restrictions do not restrain free exercise of belief, because there are many alternatives available to meeting in one large group, such as small group meetings, virtual meetings, or even the allowed drive-through type meetings. It is likely that a court would find that the restrictions do not restrain free exercise of belief due to the available alternatives such as virtual or drive-through gatherings, and therefore the rational basis test would apply. The restrictions, as mentioned previously,²⁸⁹ would pass the rational basis test easily. If, however, strict scrutiny applied, it appears that a Maine court would likely find that the restrictions pass strict scrutiny as well, due to the fact that the interest in stopping the spread of COVID-19 is very compelling.²⁹⁰ So, regardless of which test is applied, the restrictions set in place in Maine so far all appear to be constitutional.

MOVING FORWARD

As Maine continues to adapt to the changing dynamics of the pandemic, and restrictions are eased or eliminated, claims against them will likely become moot and will be dismissed before the constitutionality of the bans is even discussed. But should cases begin to spike again, possibly from a second wave of COVID-19, regulations will likely have to be adjusted, renewed, or created anew to respond to the threats to public health. As a state, Maine can respond by using the police power, a very broad power discussed in the earlier section on state powers. Those police powers would be increased during the time of a pandemic, or at least the state would get more deference in using them, depending on how the court interprets *Jacobson*.

²⁸⁸ *Supra* pp. 44-45.

²⁸⁹ *Supra* p. 48.

²⁹⁰ *Calvary Chapel of Bangor*, 2020 U.S. Dist. LEXIS 81962, at *24, n. 17.

In regard to the Free Exercise Clause, Maine would likely be able to put back into effect any of the restrictions the state has used up to this point.²⁹¹ New restrictions, however, would cease to be constitutional should they allow for too many exceptions, specifically individualized exceptions (the *Smith* test), or if they restrain the exercise of a religious belief (the *Blount* test), unless the new restrictions are able to pass strict scrutiny. Due to the extremely compelling interest of stopping the spread of COVID-19, passing strict scrutiny would likely hinge on being narrowly tailored. The cases discussed above²⁹² provide good examples of how these restrictions could or could not be considered narrowly tailored.

Well-written restrictions, that do not overreach and go further than necessary in regard to restricting religious exercise, should not have an issue being found constitutional, especially when the deference from *Jacobson* is accounted for. Restrictions that avoid overreaching are likely to avoid triggering strict scrutiny at all but are also more likely to pass strict scrutiny should it be triggered. Making note of the cases discussed above, where restrictions were struck down,²⁹³ steps can be taken when drafting to avoid crossing the line, like potentially listing religious gatherings (that are otherwise lawful, i.e. don't have too many people to violate gathering limits) as "essential," avoiding restrictions that target drive-through style religious gatherings, or avoiding too many arbitrary exceptions for things that could be found to be analogous secular conduct.

To conclude, that is where we stand in relation to responding to the COVID-19 pandemic and the Free Exercise Clause. Any restriction on religious exercise would most likely have to be able to pass both tests (*Smith* and *Blount*) discussed here, to be found constitutional as to both the United States Constitution and the Maine Constitution. When responding to the COVID-19 pandemic, legislators and decision makers must be careful to not infringe too deeply on the free exercise of religion, otherwise the restrictions will be struck down and we will risk seeing a rise in cases before we can get new, valid restrictions in place.

²⁹¹ *Supra* p. 43.

²⁹² *Supra* pp. 45-48.

²⁹³ *Supra* pp. 47-48.

CONCLUSION

To conclude, the right of substantive due process is a vital right given to every American by the Constitution, and the State of Maine must avoid unconstitutionally infringing on that right as the state continues to respond to the COVID-19 pandemic. One near certainty is that the severity of the pandemic will continue to change as we move into the colder winter months, and the legal issues and challenges are likely to change accordingly. As the pandemic evolves, and states continue to respond, it is our hope that the legal analysis provided in this Guide will continue to be relevant, as it looks back at precedent and forward at how that precedent could affect potential future issues. Keeping these legal principles in mind will help the State of Maine strike the balance between effectively responding to the COVID-19 pandemic and preserving the individual constitutional rights of its citizens.